87 1001

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

in the Supreme Court of the United States

October Term, 1987

H.K. PORTER COMPANY, INC.

Petitioner,

vs.

METROPOLITAN DADE COUNTY

Respondent.

On Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

H. K. PORTER COMPANY, INC., does not have a parent company. Its subsidiaries are wholly owned. The individual controlling the stock in H. K. PORTER also has controlling interest in Fan Steel, Inc.

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A DOT PROGRAM REQUIRING FEDERAL GRANT RECIPIENTS TO ESTABLISH MBE SUBCONTRACTING QUOTAS FOR THEIR GRANT FUNDED CONTRACTS, WHICH NEITHER INFORMS THE GRANT RECIPIENTS OF ESSENTIAL INFORMATION CONCERNING THE PAST DISCRIMINATION TO BE REMEDIED, NOR REQUIRES THE GRANT RECIPIENTS TO MAKE THEIR OWN FINDINGS OF PAST DISCRIMINATION, IS ON ITS FACE UNCONSTITUTIONAL AND VIOLATIVE OF TITLE VI OF THE CIVIL RIGHTS ACT, 42 USCA §2000(D)?

II.

WHETHER A 5% MBE SUBCONTRACTING GOAL IMPOSED BY DADE COUNTY, FLORIDA IN CONNECTION WITH A MINORITY PREFERENCE PLAN CAN BE VALIDATED SIMPLY BECAUSE OTHER COURTS HAVE APPROVED HIGHER PERCENTAGE GOALS FOR OTHER MINORITY PREFERENCE PLANS, WHEN THE REVIEWING COURT SPECIFICALLY FINDS THAT NO EFFORT WAS MADE TO DETERMINE THE AVAILABILITY OF QUALIFIED MINORITIES OR NARROWLY TAILOR THE REMEDY TO ANY HISTORY OF PAST DISCRIMINATION?

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THE OPINIONS OF THE COURTS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 324 (11th Cir. 1987). The District Court opinion was not published but is included in the Appendix.

JURISDICTION

This petition presents for review a decision of the United States Court of Appeals for the Eleventh Circuit which was dated and filed on August 24, 1987. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. Amend XIV, §1

42 USC §2000(d)

49 US §1615(a)(1)

DOT Circular 1165.1 (December 30, 1977)

DOT Order 4000.7A (March 6, 1978)

STATEMENT OF CASE

This case concerns a contract for the manufacture of the electrified third rail for the Dade County, Florida Metrorail project, identified as Contract Y-621 (Option 2). Metrorail is 80% funded through grants from the Urban Mass Transportation Administration (UMTA). The MBE provision of Contract Y-621 required five percent MBE participation and required the bidder to list in its bid the specific MBE subcontractors it would use. HK Porter was the low bidder, but was denied contract Y-621 because it failed to comply with the Minority Business Enterprise (MBE) requirements of that contract.

The MBE provisions of Contract Y-621 were prompted by Department of Transportation (DOT) Order 4007.7A (March 6, 1978) and UMTA's Circular 1165.1 (December 30, 1977). The DOT order required all grant recipients including Dade County to establish MBE contracting goals for all DOT funded projects. MBEs were defined to include Blacks, Hispanics, Asian Americans, American Indians, Alaskan natives and women. The contracting goals were to be established according to the guidelines set forth in UMTA Circular 1165.1. However, the UMTA Circular was only a general statement regarding the parameters of a program. It did not prescribe MBE percentage goals, or any method for setting percentage goals or for determining the extent to which various minority groups had been the victims of prior discrimination:

> "UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances."[1]

The UMTA circular, however, did make it clear that "[t]he setting of goals is an attempt to match projected procurements with available, qualified MBEs. Goals should be related to the availability of MBEs."[2] The Secretary of Transportation's order specifically provided that any MBE program include "reasonable written justification for those goals."[3]

The County, however, has admitted that:

1. *it made no investigations or findings* of discrimination in the awarding of contracts such as Y-621[4] against any of the groups defined as "minority persons";

2. *it made no investigations or findings* regarding the need for a racially or sexually preferential program in the awarding of Contract Y-621 to

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[1]UMTA's circular 1165.1, at 6 (December 30, 1977), Petitioner's Trial Exhibit No. 8.

[2]UMTA's circular 1165.1, at 6 (December 30, 1977), Petitioner's Trial Exhibit No. 8.

[3]D.O.T. Order 4007.7A §7(b)(1)(c)(3), p. 5.

[4]Answer to paragraph 57 of Request for Admissions (R1-15, R1-18, R1-22).

overcome the present effects of past discrimination;[5]

3. *it made no investigations or findings* regarding whether a 5% goal or quota was either necessary or sufficient to accomplish the remedial result of overcoming the present effects of past discrimination;[6]

4. *it made no inquiries* into whether 5% MBE participation was a reasonably obtainable goal or quota in connection with Y-621,[7] and is not aware of any MBE that Porter could have used in connection with Contract Y-621.[8]

5. *it had no knowledge* of any congressional determination that minority business enterprises have been discriminated against in the award of contracts in the rapid transit or contact rail industry, or that a racially or sexually preferential remedy is needed to

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[5]Answer to paragraph 58 of Request for Admissions (R1-15, R1-18, R1-22).

[6]Answer to paragraph 59 of Request for Admissions (R1-15, R1-18, R1-22).

[7]Answer to paragraph 60 of Request for Admissions (R-15, R-18, R1-22). The Trial Court, after a hearing on the County's motion to withdraw this admission, refused to allow the County to withdraw the admission. Order dated May 9, 1986, page 8-9 (R3-92-8).

[8]Transcript of hearing before Judge Kehoe, December 20, 1979, at 17-18, Petitioner's Trial Exhibit No. 16.

overcome any present effects of any such past discrimination.[9]

UMTA Circular 1165.1, moreover, recommended that the County maintain a minority contractor list to aid bidders in finding MBEs qualified to bid on the Metrorail project.[10] The County did *not* have such a list available for Contract Y-621, and so stated in the bid documents.[11]

The five percent MBE participation requirement of contract Y-621 was not based upon any previous knowledge, investigation or calculation made by the County.[12] Instead, the five percent MBE participation requirement was imposed summarily, by administrative officials.[13] The Board of County Commissioners did not consider or approve the 5% goal, nor did UMTA or any federal agency.[14]

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[9]Answer to paragraph 55 and 56 of Request for Admissions (R1-15, R1-18, R1-22) and Interrogatories 18 and 19 (R1-20, R1-22).

[10]UMTA's circular 1165.1 paragraph 6 at 11, Petitioner's Trial Exhibit No. 8.

[11]Addendum to Contract Y-621 bid specifications, page 1, Petitioner's Trial Exhibit No. 1.

[12]Answer to paragraph 69 of Request for Admissions (R1-15, R1-18, R1-22).

[13]Transcript of hearing before Judge Kehoe, December 19, 1979, at 64, Petitioner's Exhibit No. 15.

[14]Transcript of hearing before Judge Kehoe, December 19, 1979, at 64.

Failure to comply with the MBE requirements would be excused if the bidder could demonstrate the following:

> 1. "It has made every reasonable effort to contact and negotiate with minority contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;"
>
> 2. "It was unable, not withstanding such efforts, to achieve the stated goal because minority contractors were not qualified or were unavailable;"
>
> 3. "It included in its schedule such proposed agreements as could be made with such efforts."[15]

Porter presented uncontroverted evidence as to the unavailability of minorities capable of either supplying materials or performing work on this specialized manufacturing contract. Although the County knew of no minorities that could have been used, it nevertheless denied Porter the contract.

Because Porter was not awarded Contract Y-621, it suffered lost profits of $1,510,544.[16] Porter sued to recover for the wrongful denial of the contract. Jurisdiction in the trial court was predicated on the existence of a Federal Question and diversity of

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[15]Contract Y-621 Addendum 3, Article 3, §3C, at 4, Petitioner's Trial Exhibit No. 1. See also Answer to paragraph 13 of the Complaint. (R1-27-1)

[16]See Affidavit of Richard D. Lillard and Petitioner's Trial Exhibit Nos. 19 and 20.

citizenship. The claims for relief were: (1) whether the MBE program promulgated by UMTA and MDC was violative of U.S. Const., Amend. XIV, 42 U.S.C. § 1981, 42 U.S.C. § 2000d and 49 U.S.C. § 1615; (2) whether MDC acted unconstitutionally by employing a 5% MBE participation provision in its bidding procedure for contract Y-621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y-621 to Porter. The case was disposed of in favor of the County on cross motion for summary judgment.

REASONS FOR THE ALLOWANCE OF THE WRIT

A. SUMMARY

The decision of the Eleventh Circuit Court of Appeals in *Porter Co. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987) directly conflicts with the decision of the Fourth Circuit Court of Appeals in the case of *Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). Furthermore, the decision below concerns two important questions of Federal law that will continually arise and should be decided by the Supreme Court. Petitioner's argument on these points can be briefly summarized as follows.

The common thread running through the Supreme Court's recent decisions concerning minority preference programs is that such programs must be based upon "findings of prior discrimination" and must be "narrowly tailored" so as to go no further than necessary to undo the present effects of past

discrimination.[17] In the case below, the Eleventh Circuit held that generalized statements in the legislative history of the Surface Transportation Assistance Act (STAA) concerning a DOT initiative to encourage MBE participation in DOT programs was sufficient to satisfy the requirement of a governmental finding of prior discrimination. Having determined that Congress has identified discrimination on a national level, the court validated an MBE program that delegated entirely to local governments the responsibility of determining the goals for MBE participation without providing the local officials with any information as to the history of past discrimination that the goals were supposed to remedy.

Under the circumstances the local officials could not possibly "narrowly tailor" the remedy to a history of past discrimination. Such a program is facially defective.

The other issue presented for review concerns the application of the DOT MBE program to Porter. The County in the present case readily admitted that it did not follow the DOT's mandate to determine the availability of qualified minorities to participate in the contract. Indeed, the Eleventh Circuit recognized the total absence of any effort on the part of the county to narrowly tailor the remedy it imposed. Nevertheless, the Court of Appeals validated Dade County's 5% goal solely on the basis that it was a smaller percentage than

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[17] *United States v. Paradise*, ___ US ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

the percentage goals approved by the Supreme Court in other cases. This miopic rationalization ignores the fact that other MBE goals involved totally different industries, different local governments, different regions of the country and were imposed at different times.

The Eleventh Circuit's determination that MBE goals can be set blindly if they are relatively small is an open invitation for governments to chip away at the Equal Protection Rights of Citizens and should be corrected by this Court.

B. The Relevant Supreme Court Decisions

Since *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Supreme Court has decided several cases dealing with governmental programs which give preferences to minorities.[18] Although these cases did not produce majority opinions, several common threads run through the various concurring opinions. First, it seems clear that Congress has a compelling interest in eradicating the continuing effects of past discrimination against minorities in regard to their participation in government contracts. *Fullilove v. Klutznick*, 448 U.S. 448, 497, 100 S.Ct. 2758, 2784, 65 L.Ed.2d 902, 936 (Powell, J., concurring), and in remedying past and present discrimination against minorities by state actors. *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, ____, 94 L.Ed. 203, 220 (1987). It also appears

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[18] *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

that governmental bodies may employ racial classifications that are essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *Id.* at ____, 107 S.Ct. at 1064, 94 L.Ed.2d at 220. However, the "Court has never held that societal discrimination alone is sufficient to justify a racial classification. *Wygant v. Jackson Board of Education*, 476 U.S. 267, ____, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260, 269 (1986). Rather, in each of the recent Supreme Court cases, the common thread has been a requirement that there be some showing of prior discrimination *by the governmental unit involved* before allowing the limited use of racial classifications in order to remedy such discrimination. *See, e.g., Id.*; *Fullilove*, 448 U.S. at 497, 100 S.Ct. at ____, 65 L.Ed.2d at 936; *Bakke*, 438 U.S. at 307, 98 S.Ct. at 2733, 57 L.Ed.2d at 782.

The other common thread apparent in these cases is the need to have a "narrowly tailored" remedy. The means chosen to eliminate the present effects of past discrimination must be "narrowly tailored" to the achievement of the compelling goal of remedying past discrimination. *Paradise*, ____ U.S. at ____, 107 S.Ct. at ____, 94 L.Ed.2d at 231; *Wygant*, 476 U.S. at ____, 106 S.Ct. at ____, 90 L.Ed.2d at 268; *Fullilove*, 448 U.S. at 498, 100 S.Ct. at ____, 65 L.Ed.2d at 937 (Powell, J., concurring); *Bakke*, 438 U.S. at 305, 98 S.Ct. at ____, 57 L.Ed.2d at 781.

C. The Importance of the Questions Presented

Both of the questions presented relate to how to define the common thread in recent Supreme Court cases concerning the "narrowly tailored" remedy

requirement. The first question is whether Congress or an administrative agency can declare the existence of a compelling interest in establishing minority preference plans and then delegate the responsibility for creating a remedy to local government without providing the local government .with information concerning relevant past discrimination or directing that such information be compiled by the local government before implementing the remedy. The facts of this case illustrate the need for a decision on this point.

Dade County, Florida was asked to establish an MBE goal that preferred among other groups "Alaskan natives". It should be apparent that Dade County has no expertise on this point. Yet the County's reaction was to set a goal that was the same for Alaskan natives as it was for Blacks, Hispanics, Asian Americans and women. Add to this the fact that Porter had to meet the goal at its Plant in Pittsburgh, Pennsylvania and the national dimension and impact of the program become apparent. What the DOT did was to delegate to Dade County the duty to narrowly tailor a remedy to resolve a national problem, the dimensions of which Dade County could not possibly understand.

It is true that in *Fullilove* this Court held that *Congress* could conclude based upon a historical basis without preambulatory findings that minority businesses had been denied effective participation in public contracting opportunities. *Fullilove*, 448 U.S. at 477-78, 100 S.CT. at 2774, 65 L.ED.2d at 924. Congress may legislate without compiling the kind of record appropriate with respect to judicial or administrative hearings. *Id.* In *Fullilove*, however, *Congress itself* not

only determined the compelling interest but also narrowly tailored the remedy. *Id.* In the present case, a *governmental administrative agency* relied upon a compelling interest allegedly determined by Congress and *delegated* the duty to narrowly tailor a remedy without regard to the nature of the compelling interest or providing evidence of past discrimination.

No information concerning evidence of relevant past discrimination was supplied by the DOT to the local entity responsible for tailoring an MBE program nor was there a directive that such data be compiled. *See generally*, DOT Order 4007.7A (March 6, 1978); DOT Circular 1165.1 (December 30, 1977).[19] It is clear from what happened in this case that the Court's previously expressed concern about overly broad or conclusionary remedies will be ignored repeatedly unless a decision is made regarding the extent to which the duty to fashion race and sex conscious remedies can be delegated and the information which must accompany the delegation.

The second question concerns the ability of reviewing courts to rubber stamp minority preference programs, simply because the percentage of the

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[19]Indeed the UMTA circular defining the program specifically invisioned that the geographic basis for setting certain types of MBE goals would have to be national as opposed to local. Yet rather than enlighten Dade County as to the history of prior discrimination perceived to exist by region or otherwise, the UMTA circular simply directed the county to use a "common sense approach." *See* UMTA Circular 1165.1 (Dec. 30, 1977) at page 6. A copy of the relevant portion of the UMTA Circular, entitled "Percentage Goals for the Dollar Value of Work to be Awarded to MBEs" is included in the Appendix to this Petition.

preference is relatively small. If not addressed every minority preference program in the country could be validated if it was less than the 10% set aside in *Fullilove*. The important principle that race conscious remedies be narowly tailored will be consistently ignored if governmental units can practice in little increments the discrimination clearly forbidden in larger doses.

D. Conflict Among the Circuits

As to the meaning of the common thread in the court's opinion that a race conscious remedy should be narrowly tailored, there would appear to be a conflict in interpretation between the Fourth and the Eleventh Circuits. *Compare Croson Co. v. City of Richmond*, 822 F.2d 1353 (4th Cir. 1987) *with Porter*, 825 F.2d 324 (11th Cir. 1987). In *Croson*, the Fourth Circuit Court of Appeals held that a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. *Croson*, 822 F.2d at 1357. The court, in its examination of where the City's minority preference plan was narrowly tailored, held that "[f]indings of societal discrimination will not suffice; the findings must concern 'prior discrimination *by the government unit involved.*' " *Id.* at 1358 (quoting *Wygant*, 476 U.S. at ____, 106 S.Ct. at 1847, 90 L.Ed.2d at 269) (emphasis in the original). This requirement was found to be essential to prevent local governments from adopting "sweeping racial preferences at their pleasure, whether they were legitimate remedial measures or bald dispensations of public funds and employment based on politics of race. *Id.* at 1358.

Similar to the situation in *Porter*, the court found that the local entity involved thought it was permissible to simply adopt a contract set aside identical to the one upheld in *Fullilove*. *Id.* at 1359. As in *Porter*, much of the discussion in the hearings concerning the plan were based on the premise that it was permissible to adopt such an identical plan. *Id.* The court found, however, that national findings alone do not establish the need for action in a particular locality. *Id.* If they were sufficient, they would undercut *Wygant's* rejection of societal discrimination as a basis for remedial action. *Id.* at 1359-60. The court also emphasized that the minority preference plan upheld in *Fullilove* was based on this court's emphasis upon Congress' special competence to act on its finding that a minority preference plan was needed on a national level. *Id.* at 1360.

The Fourth Circuit in *Croson* ultimately held the thirty percent set aside in question to be invalid as that figure had "simply emerged from the mists," was chosen arbitrarily, and failed to be tied to a relevant percentage of minority owned subcontractors in the relevant geographical area. *Id.*

The court also found that the definition of minority owned business, which is very similar to the definition of MBE in *Porter*, was not itself narrowly tailored to the remedying of past discrimination. The definition of minority to include citizens who were Blacks, Spanish-speaking, Orientals, Indians, Eskimos or aliens, again similar to the definition in *Porter*, illustrated the undifferentiated nature of the plan. *Id.* at 1361. No explanation was given as to why these particular

minorities were favored or that the government entity involved had ever engaged in discrimination against each of these groups. *Id.*

Finally, the *Croson* court noted that while a waiver provision may help to narrow the scope of a minority preference plan's operation, a waiver cannot cure constitutional defects such as the lack of participated findings of discrimination. *Id.* at 1361. Like the waiver provision in *Porter*, the waiver provision in *Croson* was limited to exceptional circumstances and was a matter of administrative discretion. *Id.*

In contrast, the Eleventh Circuit in *Porter* took a different approach in regard to this Court's concern that minority-preference plans be narrowly tailored. Prior to its analysis of whether the MDC minority preference plan was narrowly tailored, the Eleventh Circuit referred to the same language in *Wygant* interpreted by the Fourth Circuit in *Croson*. *Porter*, 825 F.2d at 331 (citing *Wygant*, 467 U.S. at ____, 106 S.Ct. at 1847, 90 L.Ed.2d at 269). This language reflected this Court's concern that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* Nevertheless, the Eleventh Circuit held that MDC was not required to make detailed and specific findings concerning past discrimination as MDC was entitled to rely on Congress' general legislative findings that clearly established that minorities were not participating in government contracts. *Id.* at 331 (citing *Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774, 63 L.Ed.2d at 924). As Congress was concerned about a national

problem, Congress' findings provided adequate support for local projects such as the one implemented by MDC. *Id.*

Thus, it was of no significance to the court that the public record in *Porter* reflected that MDC *had not* conducted detailed studies regarding past discrimination against MBE's in the awarding of contracts or conducted investigations regarding the availability of qualified MBE's to participate in its plan. *Id.* at 332. In addition, while "troubled" by MDC's decision to use the five percent figure without supporting or substantiating it in regard to the relevant labor market, the court upheld this arbitrary percentage simply because other federal courts had upheld minority preference plans utilizing much higher percentages. *Id.*

Clearly, the Eleventh Circuit's approach disregards the concern announced in *Bakke, Fullilove* and *Wygant, supra* that a minority preference program be in truth and in fact narrowly tailored. By contrast the approach taken in *Croson* illustrates respect for the important principle that race and sex conscious remedial action be narrowly tailored.

CONCLUSION

It is respectfully suggested that the Court accept jurisdiction to review the decision entered in this cause by the Eleventh Circuit Court of Appeals.

87 1001

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October Term, 1987

H.K. PORTER COMPANY, INC.,

Petitioner,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Respondent.

APPENDIX

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[324]

H.K. PORTER COMPANY, INC.,
Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY, John Dyer, individually and as Contracting Officer for Metropolitan Dade County, Defendants-Appellees.

No. 86-5448.

United States Court of Appeals,
Eleventh Circuit.

Aug. 24, 1987.

Lowest bidder brought action against county to challenge affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system. The United States District Court for the Southern District of Florida, No. 81-2766-CIV-EBD, Edward B. Davis, J., awarded summary judgment to county. Lowest bidder appealed. The Court of Appeals held that: (1) statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement, and (2) affirmative action program did not violate equal protection.

Affirmed.

1. Civil Rights —9.5

Statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement on contract for electrified third rail of metropolitan transit system. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689: Civil Rights Act of 1964, § 601, as amended, 42 U.S. C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1).

2. Constitutional Law —219.1

Affirmative action program, that required 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was justified by Congress' compelling interest in eradicating continuing effects of past discrimination, was narrowly tailored to achieve stated goal of fostering minority participation, and did not violate equal protection, where program ended when construction was completed, and where bidding procedure excused bidder from contracting or subcontracting with minority business enterprises, if bidder demonstrated reasonable effort to contact and negotiate with minority businesses. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

3. **Constitutional Law —219.1**

County, that used affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was not required by equal protection clause to make findings in addition to Congress' legislative findings establishing that minorities did not participate in government contracts. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

[325] Guy W. Harrison, Mershon, Sawyer, Johnston, Dunwody & Cole, Charles C. Kline, Miami, Fla., for plaintiff-appellant.

Robert S. Ginsburg, Dade Co. Atty., R.A. Cuevas, Jr., Asst. Co. Atty., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The dispute in this case arises out of the award of a federal construction contract for the electrified third rail of Miami's metropolitan transit system. Appellee, Metropolitan Dade County ("MDC") awarded the

contract to the second lowest bidder, Transit Products, Inc. based upon an affirmative action plan. The low bidder, H.K. Porter, Inc., appellant, alleged that the affirmative action plan was unconstitutional. The district court awarded summary judgment to MDC. Finding no error, we affirm.

The facts and procedural history are set out in detail in this court's opinion, *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 7[illegible]3, 779-81 (5th Cir. 1981).[1] For the purposes of the immediate controversy, however, we here set forth a brief synopsis of the relevant facts.

On November 6, 1978, Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub.L. No. 95-599, 92 Stat. 2689 (1978), which appropriated sums of federal money for the construction of highways and mass transportation systems. In the STAA legislative history, the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs. H.R. Rep. No. 95-1 85, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 6575, 6647. To facilitate this initiative, grantees of STAA funds were required to establish written affirmative action plans which included percentage goals for minority business participation.

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[1]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) this court adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

In 1979 MDC proposed to construct a rapid transit system for the metropolitan Miami area. Pursuant to the STAA, the Urban Mass Transit Administration ("UMTA") of the Department of Transportation ("DOT") would finance 80% of the costs of the project. MDC would contribute the remaining 20%. On December 30, 1977, DOT issued Circular 1165.1—a statement of DOT's policy and requirements for UMTA grant recipients. The circular stated that "It is UMTA policy that MBE's [minority business enterprises][2] shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." The circular further stated that failure to follow UMTA policy could result in disqualification of grantee funds. Additionally, on March 6, 1978, DOT issued Order 4000.7A,[3] [326] which re-emphasized the

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[2]For the purposes of contract Y-621, a minority business enterprise was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

[3]Order 4000.7A stated in pertinent part:

> a. It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department. Economically and socially disadvantaged individuals, including minorities and women, have traditionally been underrepresented as owners and managers of businesses in this country. The

enforcement of DOT's MBE program. Both the circular and the order encouraged all grant recipients to establish percentage goals for MBE participation.

(Footnote 3 Continued)

executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve the goal of equal opportunity. To overcome the traditional underrepresentation of these groups in the business community, the federal government has used its procurement authority and its financial assistance programs to state and local governments as vehicles to assist minority business enterprises. Executive Order 11625 directs the Department of Commerce to provide technical and financial assistance to promote MBEs. Executive Order 11625 further requires that federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise.

b. The Department of Transportation is firmly committed to fulfilling its responsibilities under this Executive Order and to meet the goal of greater MBE participation in contracts and projects funded by the Department, although this may result in some increased cost to DOT. To this end, DOT is requiring each of its operating elements and all aid recipients and their contractors to make strong affirmative action efforts designed to set and meet goals for increasing MBE involvement. These efforts will encompass all aspects of the procurement of supplies, equipment, contruction and services, including professional service contracts, concession contracts and bank deposits.

c. The Department recognizes that meaningful gains in the level of MBE participation can be achieved only with energetic enforcement of this order and the commitment of all DOT employees, grantees and contractors to the goals of equal opportunity.

On June 10, 1979, MDC advertised for bids[4] from prime contractors interested in the electrified third rail to be used in the construction of the transit system under contract Y-621. Pursuant to STAA's initiative, MDC's bid invitation included a minority contractor provision which required each bidder to either (a) involve MBE's in 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority contractors in an attempt to achieve the stated goal. The bid invitation also contained a provision which allowed the bidder to demonstrate that it was unable to involve minority business, notwithstanding their efforts to contact and negotiate, because minority contractors were either not qualified to do the work

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[4]Contract Y-621's bidding requirements and procedures required each bidder, as part of its bid submission, to submit:

> a completed Schedule for Participation by Minority Contractor, listing those Qualified Minority Contractors with which the Bidder intends to contract for the performance of portions of the work under the Contract, specifying the agreed price to be paid to each such Minority Contractor for such work, identifying in detail the contract items or parts thereof to be performed by each such Minority Contractor, including a proposed timetable for the performance of each such contract item and providing other information as may be required by the Schedule. No work shall be included in the Schedule which the Bidder has reason to believe the listed Minority Contractor will subcontract, at any tier, to a non-Minority Contractor.
>
> a completed and signed Letter of Intent for each Minority Contractor listed in the Schedule;
>
> a completed and signed Minority Contractor Identification Statement of each Minority Contractor listed in the Schedule and for the Bidder if it is a Minority Contractor, but no Minority Contractor Identification Statement is required for any Minority Contractor named in the Minority Contractor List,

required of the contract or because minority contractors were unavailable. The contract's Minority Contractor Participation Provision required each bidder to list the minority contractors the bidder intended to use if awarded the contract.

MDC received three bids for contract Y-621. The two lowest bids were received from Transit Products, Inc., ("Transit") and H.K. Porter ("Porter"). The bid from [327] Transit was for $8,373,502 and the bid from Porter was for $8,076,506.80. However, Porter, rather than list the minority contractors it intended to use if awarded the contract, left the six pages in contract Y-621's Minority Contractor Participation Provision blank. Porter instead attached a letter stating that no minority firms produced the required materials and that Porter would therefore "follow the same plan and outlines that

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(Footnote 4 Continued)

> and in the event the work listed on the Schedule is not sufficient to fulfill the stated goal, a statement by the Bidder of the reasons why it believes it is in compliance with this Provision and a list of the names, addresses and telephone numbers of the Minority Contractors contacted by the Bidder with respect to the performance of work under the Contract. The listing of a Minority Contractor by a Bidder on its Schedule shall constitute a representation by the Bidder that such Minority Contractor is Qualified and not Unavailable, and a commitment by the Bidder that if it is awarded the Contract it will enter into a sub-contract with such Minority Contractor for the portion of the work and at the price set forth in its bid submission, subject to the terms of this Provision.

The bidding procedures further stated that "MDC shall not award a [c]ontract to any [b]idder which it determines fails to comply with the applicable requirements of this [p]rovision."

we have had approved on other transit programs." The bid submitted by Transit involved 5% minority contractor participation in compliance with contract Y-621's 5% MBE goal.[5] MDC decided, after extensive proceedings[6] both at the administrative level and in federal court to accept the bid proposed by Transit, despite the fact that Porter's bid was lower since Porter's bid did not comply with the contract's MBE provisions. Porter was given a compliance hearing on November 28, 1979. At the compliance hearing Porter was asked by MDC's Compliance Officer, Dr. James Corbin, to explain why it had not complied with contract Y-621's bidding procedure of listing the minority contractors it had contacted in order to meet the 5% MBE goal. Porter responded by stating that it had made a recent investment in an in-house assembly plant in Chicago that totally assembled all the component parts of the electrified third rail. Porter stated that due to its in-house assembly plant, only four items from outside sources were necessary to produce the electrified rail.[7] Porter stated that no minority firms produced any of these four items. Porter testified that because of the nature of its in-house plant, it was "economically

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[5]One of the minority firms Transit originally included in its bid for contract Y-621 was questioned by Porter as not being a bona fide MBE. Transit thereafter substituted a legitimate MBE, as it was allowed to do under contract Y-621's bidding procedure.

[6]*See H.K. Porter*, 650 F.2d 778 (5th Cir. 1981).

[7]The General Manager of Porter's in-house assembly plant in Chicago, Mr. Gerhard O. Mietz, stated that contract Y-621 required four basic components: (1) steel rail, (2) aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste to be applied to aluminum and steel.

impracticable" to break down contract Y-621 in an attempt to subcontract to MBE's.

On December 10, 1979, MDC's Contracting Officer, John Dyer, opined to MDC's Board of County Commissioners that Porter's bid was not in compliance with the minority participation provisions of contract Y-621. On December 10, 1981, Porter brought the immediate action against MDC, and John Dyer, as the Contracting Officer. Porter's complaint alleged that MDC's 5% MBE goal was both unconstitutional on its face and as applied in violation of 42 U.S.C. §§ 1981, 1983, 2000d (1982) and 49 U.S.C. § 1615 (1982). Porter also contended that MDC and John Dyer acted in an arbitrary and capricious manner in denying contract Y-621 to Porter. Porter also alleged $1,510,544.00 in damages as a result of not being awarded the contract.

Both MDC and Porter filed cross-motions for summary judgment before the district court. The district court held a pretrial conference, allowing both parties to present their arguments. The district court ruled that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC, in denying the contract to Porter did not act arbitrarily or capriciously. The district court granted summary judgment in favor of MDC and against Porter. Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since we find that there is no genuine issue as to any material fact, we affirm.

DISCUSSION

This case presents three issues: (1) whether the MBE program promulgated by the UMTA and MDC was violative of 42 U.S.C. § 2000d and 49 U.S.C. § 1615 thereby making the program unconstitutional on its face; (2) whether MDC acted unconstitutionally by employing a 5% MBE participation [328] provision in its bidding procedure for contract Y-621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y-621 to Porter.

With respect to the facial unconstitutionality of MDC's MBE program, Porter argues that the UMTA did not have the authority to promulgate such a program because Congress has statutorily prohibited any and all UMTA-funded programs from employing affirmative action. 42 U.S.C. § 2000d (1982) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Porter argues § 2000d, therefore, cannot be used to authorize the MBE program propounded by UMTA. 49 U.S.C. § 1615(a)(1) provides:

> (a)(1) No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter.

Accordingly, Porter argues, any use of racial, ethnic or sexual criteria in awarding contract Y-621 is facially violative of both 42 U.S.C. § 2000d and 49 U.S.C. § 1615. Although we agree with Porter that the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes, we are constrained to follow the precedential mandates of the Supreme Court. The Supreme Court has recently stated, "[i]t is now well established that government bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, ____ U.S. ____, ____, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987). In *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court held that Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. § 2000e, et seq., left free both private unions and employers to voluntarily employ a collectively bargained plan that reserves for black employees 50% of the opening positions in an in-plant craft-training program until the percentage of black craftsmen in the plant is commensurate with the percentage of blacks in the local labor force. In *Weber*, the respondent argued that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument was based upon a literal interpretation of § 703(a) and (b) of Title VII. Those sections on their face make it unlawful to discriminate on the basis of race in the hiring and selection of apprentices for training programs. *Weber*, 443 U.S. at 201, 99 S.Ct. at 2726. In rejecting a literal interpretation of those statutes, the Court stated, "[i]t is a 'familiar rule, that a thing may

be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.' " *Id.*, (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). The Court stated that the prohibition against discrimination contained in § 703(a) and (b) must be construed in light of the legislative history of the acts and the historical context in which the acts arose. *Id.*

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court upheld the facial constitutionality of a similar federally funded project, which included a similar MBE provision. In *Fullilove*, Congress had enacted the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701-6736, which authorized $4 billion dollars for federal grants made by the Secretary of Commerce to state and local governmental entities for use in local public work projects. Section 103(f)(2) of the Act, the MBE provision, required at least 10% of any local works project to be set aside for minority business enterprises. In upholding the constitutionality of the MBE provision as a legitimate remedial congressional objective, the Court stated [329] that, "[t]he legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463, 100 S.Ct. at 2767.

[1] Therefore, we here analyze the prohibitions against discrimination contained in § 2000d and 49 U.S.C. § 1615(a)(1) in light of the legislative and historical context in which the acts arose. An

examination of the legislative and historical background giving rise to the promulgation of § 2000d and § 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitution antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483-84, 100 S.Ct. at 2777. Thus we conclude that in this case the UMTA had the authority, pursuant to the clear and strong Congressional mandate, to promulgate the MBE program relative to contract Y-621.

Porter also argues, however, that the MBE provisions of contract Y-621 were unconstitutional as applied. Porter's argument is grounded solely in Porter's interpretation of this court's opinion in *South Florida Chapters of Associated Contractors of America v. Metropolitan Dade Co.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Porter alleges that the MBE provisions of contract Y-621 were unconstitutionally applied because the authorities failed to follow the three "common concerns" enunciated in *South Florida. Id.*, at 851-52. Porter argues that *South Florida* provides "a clear and detailed blueprint" for evaluating all minority preference programs. We think Porter's reliance on *South Florida* is misplaced. *South Florida* involved the constitutionality of a county ordinance and resolution granting to black contractors preferential treatment in the county's bidding process. *South Florida*, 723 F.2d at 847-48. In *South Florida* the Dade County Commission, in response to the May 1980 disturbances in Liberty City, passed an ordinance which operated to waive altogether the formal contract bidding process and to grant to black contractors the exclusive right to bid on the construction projects of the county. The ordinance also contained a sub-contractor's provision requiring that fifty percent of the dollar value of any county contract be awarded to black sub-contractors. *Id.*, at 848-49. The ordinance was challenged both facially and as applied to the county construction project for the Earlington Heights Metro-rail Station.[8] *Id.* at 848.

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[8]The Earlington Heights Metrorail Station is one of the metrorail stations located in Dade County.

In analyzing the constitutionality of the race-conscious legislation, this court "[w]ithout adopting a formal 'test.'" *South Florida*, 723 F.2d at 852, articulated what it construed to be the three common concerns to the various views of the Supreme Court in *Regents of the Univ. of California* [330] *v. Bakke*,[9] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758: "(1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another, and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination." *South Florida*, 723 F.2d at 851-52. These common concerns were set forth merely as safeguards to be used by a reviewing court in analyzing "*[l]egislation* employing benign racial preferences." *Id.*, (emphasis supplied). We therefore reject Porter's contention that *South Florida* provides federal courts with a detailed set of mandatory guidelines with which to analyze the constitutionality of any and all MBE programs.

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[9] *Regents of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) was the Supreme Court's first direct confrontation with affirmative action programs. Petitioner Bakke challenged an admission program of the University of California's Davis Medical School, whereby sixteen of one hundred spaces available for the entering class were set aside solely for minority applicants. The case produced no majority, however, five justices held the quota invalid.

Moreover, the Supreme Court has set forth a two-prong test to be applied in situations wherein preferential classifications are based upon racial and ethnic distinctions. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, ____, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986). In *Wygant*, the Court was called upon to decide the constitutionality of whether a school board could, consistent with the Equal Protection Clause, extend preferential employment protection to certain employees solely because of their race or ethnic origin. *Wygant*, 106 S.Ct. at 1884. The Court stated the classifications operated "against whites and in favor of certain minorities, and therefore constitutes a classification based on race." *Id.* at 1846. The Court went on to state such classifications must be justified by a compelling government interest. *Id.* Secondly, the means chosen to effectuate this interest or purpose must be narrowly tailored to the achievement of that goal. *Id.* (citing *Fullilove*, 448 U.S. at 480, 100 S.Ct. at 2775).

In addition, the Court has recently set forth factors to be considered in analyzing the appropriateness of race-conscious remedies. *Paradise*, 107 S.Ct. at 1067. These factors include, "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* We will therefore analyze the constitutionality of contract Y-621's MBE provision under the test set forth in *Wygant* while also considering the factors articulated in *Paradise*.

[2] We have noted that MDC, in implementing the MBE provisions of contract Y-621, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts. *See Fullilove*, 448 U.S. at 497, 100 S.Ct. at 2784 (Powell, J., concurring); Further, the Supreme Court has recently made it clear that "[t]he government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise* 107 S.Ct. at 1065. Congress' determination to foster greater MBE participation in government contracts was due, in part, to the fact that other potential possible remedies had proven unsuccessful. *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring).

As for the duration of the relief, there is nothing in the record to suggest that MDC's bidding procedure for contract Y-621, including the MBE provision, was anything more than a temporary remedy. It was simply an absolute condition MDC had to meet to receive federal funds through the UMTA in order to finance the construction [331] of the metrorail system. This procedure, being temporary, was not a policy of MDC to maintain a racial or ethnic balance, but was rather intended by Congress to eliminate a manifest racial and ethnic imbalance. *See Weber*, 443 U.S. at 208, 99 S.CT. at 2729. Indeed, this particular program ended when the construction for contract Y-621 was completed. MDC's bidding procedure for contract Y-621 also contained a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with

MBE's but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779 (significant that an administrative scheme provides waiver mechanism under MBE program).

We next consider whether the 5% goal implemented by MDC in connection with contract Y-621 is sufficiently narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts. *See Paradise*, 107 S.Ct. at 1067-74; *Wygant*, 106 S.Ct. at 1846. In *Wygant*, the Supreme Court decided a case involving constitutional implications analogous to the constitutional questions presented in this case. *Id.* at 1844. As we noted earlier in *Wygant*, the Court was called upon to decide whether a school board could, consistent with the equal protection clause, extend preferential employment protection against layoffs to its employees solely because of their race or national origin. *Wygant*, 106 S.Ct. at 1844. In *Wygant*, community racial tensions prompted the Jackson Board of Education to include a layoff provision in the collective bargaining agreement between the Board of Education and the Jackson Education Association that operated to lay off tenured non-minority teachers while allowing minority teachers on probation status to be retained. *Id.*, 106 S.Ct. at 1844-45. When layoffs became necessary the Board retained the tenured non-minority teachers, thus refusing to follow the layoff provision of the collective bargaining agreement. *Id.*, 106 S.Ct. at 1845. The Jackson Education Association, along with two minority teachers who had been discharged, alleged the Board's failure to adhere to the layoff provision

violated the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964. *Id.* On cross motions for summary judgment, the district court, *inter alia*, dismissed the claims holding "that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination." *Id.*, at 1846. The Court of Appeals for the Sixth Circuit affirmed. *Id.* The Supreme Court reversed holding that the layoff plan was not sufficiently narrowly tailored, *inter alia*, because the plan was not supported by finding of past discrimination. *Id.* at 1846-52. The court pointed out that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* at 1847.

[3] Porter argues that since Congress delegated to MDC the actual implementation of contract Y-621's MBE provision, MDC was required to make detailed and specific findings concerning past discrimination. We disagree. As indicated, MDC in implementing the MBE provisions of contract Y-621, was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts. *See Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774. Indeed, Congress' findings led the STAA to require that minority percentage goals be established as an absolute condition precedent to the receipt of federal funds. We hold that under the circumstances of this case, MDC was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract. Congress was concerned about a national problem. Its findings provide adequate support for such local projects.

Porter argues, nevertheless, that the 5% MBE goal in contract Y-621 is not narrowly tailored and thus unconstitutional as applied [332] because the goal was not based upon a study or investigation of the availability of qualified MBE's to participate in contract Y-621. The record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621.[10] We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621. *See Paradise*, 107 S.Ct. at 1071. We share the Supreme Court's concern with racial and ethnic factors when used as a basis for affirmative action programs. *See Wygant*, 106 S.Ct. at 1847. ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781). Opinion of Burger, C.J.). However, federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case. As noted, the Supreme Court in *Fullilove*, approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable

[10]MDC in fact proffered studies allegedly supporting the determination of a 5% MBE goal for contract Y-621 at the district court, however, the district court did not allow the proffered studies into evidence. MDC has not cross-appealed this ruling. Thus, no such studies appear in the record for our consideration.

means of redressing the present effects of past discrimination. *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758. In *Weber*, the Court held Title VII did not prohibit an affirmative action plan collectively bargained between the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation which reserved for black employees 50% of the opening positions in a sought after training program. *Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. The Court in *Paradise*, 107 S.Ct. at 1067-74, upheld a one-black-for-one-white race conscious promotional requirement within the Alabama Department of Public Safety imposed by the district court as being sufficiently narrowly tailored to remedy past discrimination. It is also significant that MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors, and thus does not impose an unacceptable burden on innocent third parties. *See Paradise*, 107 S.Ct. at 1073; *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. All that was required by Porter was that Porter demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available. Further, the record reflects that MDC's decision to deny the award of contract Y-621 to Porter was not based solely on Porter's failure to meet the 5% MBE goal. The decision was also based on Porter's failure to make any effort to attempt to locate and contract or sub-contract with MBE's. The district court, in granting summary judgment against Porter, noted that Porter did not contact a single MBE, other than its already existing suppliers. We agree with MDC and the district court's conclusion that Proter has not demonstrated that it made every reasonable effort to

attempt to locate and contract or sub-contract with MBE's. The district court concluded that the MBE provision of contract Y-621 was not unconstitutional. After our own examination of the record, taking into consideration the particular facts of this case and the relevant case law, we hold that MDC's use of a 5% MBE goal in contract Y-621 is not unconstitutional.

Porter's last argument is that MDC acted arbitrarily and capriciously in denying the award of the contract to Porter. Having held that MDC's bidding procedure for contract Y-621 is constitutional, this argument is without merit.

AFFIRMED.

[FILED MAY 9 1986]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-EBD

H.K. PORTER CO., INC.

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Defendants.

OPINION OF THE COURT GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

THIS MATTER is before the Court on the parties' cross-motions for summary judgment. At a pretrial conference, the Court heard argument from counsel on the issues to be tried and made various evidentiary rulings. The parties stated that the case could be decided without a trial upon the pleadings, if the record in *H.K. Porter Co., Inc. v. Metropolitan Dade County,* Case No. 79-4875-CIV-KING, were incorporated in the record in this case and the parties were allowed to supplement the record. The Court agreed to incorporate the record in Judge King's case into this case and allowed the

parties to supplement the record. The Court agreed that the case could be taken under advisement on the parties' cross-motions for summary judgment on the issue of liability, although genuine issues of material fact remained as to the amount of damages. Rule 56(c) of the Federal Rules of Civil Procedure states: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

For the reasons expressed in this opinion, the Court concludes that the Defendants are not liable for damages to the Plaintiff, Therefore, Defendants' motion for summary judgment is GRANTED, and Plaintiff's motion for summary judgment is DENIED. Defendant is awarded taxable costs of this litigation in accordance with 28 U.S.C. §1920 and Fed.R.Civ.P. 54(d), to be taxed by the Clerk of this Court. Each party shall bear its own attorney's fees pursuant to 42 U.S.C. §1988. The Clerk is directed to close this case.

I. PLAINTIFF'S CLAIM

Plaintiff contractor, H.K. PORTER CO., INC., alleges that the inclusion of a 5% minority business enterprise goal in a contract for Defendant DADE COUNTY's Metrorail System amounts to reverse racial discrimination against white-owned contractors in violation of civil rights laws and the Constitution, actionable under 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d, and 49 U.S.C. §1615 and within this Court's federal question jurisdiction, 28 U.S.C. §1331 and its jurisdiction under 28 U.S.C. §1343. Defendants' minority business enterprise goal is allegedly

unconstitutional on its face and unconstitutional as applied to Plaintiff, H.K. PORTER. Further, Plaintiff contends that Defendant, JOHN A. DYER, contracting officer with Metropolitan Dade County, in refusing to waive the 5% minority business enterprise goal to award H.K. PORTER the Metrorail contract in question, acted in an arbitrary and capricious manner in violation of Florida administrative law, actionable as a pendent claim within this Court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Defendants deny violating either the federal civil rights laws of Florida administrative law by their decision not to award Plaintiff the Metrorail contract.

Plaintiff seeks damages in the amount of $1,510,544.00, plus interest on the damages from 1979, in addition to costs and attorney's fees.

II. PROCEDURAL HISTORY

This protracted litigation over a contract for the electrified third rail in DADE COUNTY's Metrorail rapid transit system began in District Court for the Southern District of Florida in October, 1979. The first lawsuit was styled *H.K. Porter Co., Inc. v. Metropolitan Dade County,* Case No. 79-4875-CIV-KING. A December 28, 1979 ruling by Judge James W. Kehoe in that case was appealed to the former Fifth Circuit, which vacated Judge Kehoe's order on procedural grounds and remanded the case with instructions to dismiss the complaint for injunctive relief without prejudice. *H.K. Porter Co., Inc. v. Metropolitan Dade County,* 650 F.2d 778, 783 (5th Cir. Unit B 1981) (Johnson, J.) The Court of Appeals held that Judge Kehoe, in granting

Defendant DADE COUNTY's motion to dissolve a temporary restraining order, improperly ruled against the Plaintiff on the merits of its constitutional claim instead of restricting its review to the temporary restraining order issues before it. *Id.* In accordance with the mandate of the former Fifth Circuit, Judge King dismissed the complaint, which had solely sought injunctive relief, in Case No. 79-4875-CIV-KING on September 20, 1981. On December 10, 1981, Plaintiff, H.K. PORTER filed a new complaint regarding the same matters involved in the first lawsuit, but seeking money damages and adding JOHN A. DYER as a Defendant. In accordance with the ruling of the Court of Appeals, this Court has accorded no precedential effect to Judge Kehoe's order ruling against Plaintiff on the merits. *See Id.* ("the district court's order will be without precedential effect"). The Court has reviewed the file in the first lawsuit, received voluminous additional evidence, reviewed numerous memoranda submitted to the Court, and heard argument of counsel on the merits of Plaintiff's claim.

III. FACTS

The facts are well-presented in Judge Johnson's opinion for the former Fifth Circuit, *H.K. Porter Co., Inc. v. Metropolitan Dade County,* 650 F.2d 778, 779-781 (5th Cir. Unit B 1981).

"On June 10, 1979, appellee Metropolitan Dade County (MDC) advertised for bids on an electrified third rail of a proposed rapid transit system for the Miami metropolitan area scheduled for completion in 1984. The construction costs for the electrified rail entitled

Contract Y-621 were estimated at $9.1 million; the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) was to finance 80% of these costs through a federal grant and MDC would contribute 20% of the costs. On August 8, 1979, three bids on Contract Y-621 were received and Porter Co.'s $8,076,506.30 bid was the lowest; Transit Products, Inc., (Transit), which is not a party to this action, made the second lowest bid at $8,373,502.00.

"MDC's bid invitation included a Minority Contractor Participation provision (Addendum 3) which required each bidder to either (a) involve minority business enterprises (MBD's) at 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority business enterprises in an attempt to subcontract work to achieve the 5% goal.[1] Porter Co.'s bid included the Addendum 3 forms but the forms were blank; Transit's bid included two minority contractors (businesses owned or controlled by women) for $580,000 of the contract work. Transit protested Porter's bid for failing to comply with Addendum 3. MDC decided to reject all of the bids on Contract Y-621 but it failed to follow its own procedures in doing so.

"On October 17, 1979, Porter Co. filed this diversity action against MDC alleging its failure to offer Porter Co. the requisite administrative review to determine whether Porter Co.'s bid was in compliance with the MBE provision. The district court (Judge King) granted Porter Co. an *ex parte* TRO on October 18, 1979, to maintain the status quo until the court could entertain Porter Co.'s preliminary injunction motion.[2] The TRO

was extended twice and was to expire on November 3, 1979; on November 2, 1979, the district court granted Porter Co.'s summary judgment motion and ordered MDC to reinstate all of the bids and to hold a hearing before a Contracting Officer as required by MDC's regulations in order to evaluate the responsiveness of Porter Co.'s bid. During the interim, Porter Co. had amended its complaint to allege that MDC's rejection of all the bids was arbitrary and capricious and to request a mandatory injunction requiring MDC to award the contract to Porter Co.

"The compliance hearing was held on November 28, 1979, before Contracting Officer John Dyer; after hearing Porter Co.'s evidence, Dyer determined that Porter Co. had not complied with MBE's provision and indicated that he would recommend that Transit be awarded the contract.[3] UMTA concurred with Dyer's decision which assured the 80% federal participation. After learning that Dyer planned to make his recommendation to MDC on December 18, 1979, Porter Co. sought and received, on December 18, an emergency *ex parte* TRO which enjoined MDC from awarding the contract to another bidder for ten days. Porter Co. also moved for an order to show cause why MDC should not be held in contempt of the district court's summary judgment order. MDC responded by moving for an emergency hearing to dissolve the TRO because the delay in awarding Contract Y-621 was causing a significant increase in the contract's overall price.

"The district court (Judge Kehoe)[4] held a hearing on these motions on December 18 and 19 at which both parties were able to argue and present evidence. Porter

Co. amended its show cause motion on December 20, 1979, to allege for the first time that the MBE requirements exceeded the government's statutory authority and violated the equal protection clause of the Constitution and Title VI of the Civil Rights Act of 1964. Additionally, Porter Co. moved on December 21 for leave to file a supplemental complaint which sought to join the United States Secretary of Transportation as a party and included the allegations of the unconstitutionality of MDC's actions. On December 27, 1979, Porter Co. filed a second preliminary injunction motion to preserve the status quo once the TRO expired on December 28; alternatively, Porter Co. moved to extend the TRO to prevent MDC from awarding the contract to Transit.

"On December 28, 1979, the district court granted MDC's motion to dissolve the TRO and denied Porter Co.'s show cause motion and motion for leave to file a supplemental complaint. In its memorandum opinion, the district court (Judge Kehoe) indicated that it was determining the merits of the pending motions of both parties. Consequently, the district court reached the merits of Porter Co.'s allegations that the MBE goal was unconstitutional; the court found that the 5% goal was constitutional and that the goal as applied to Porter Co. did not exceed the bounds of fundamental fairness. Moreover, in denying Porter Co.'s motion to show cause why MDC was not in contempt, the district court reviewed the hearing held before Contracting Officer Dyer and found that the hearing complied with Judge King's order granting summary judgment for Porter Co. The district court denied Porter Co.'s motion to add the Secretary of Transportation as a party defendant

without discussion. Porter Co.'s second preliminary injunction motion was not mentioned in the December 28, 1979 order but Porter Co. has not alleged any error with respect to the district court's treatment of that motion.

"Porter Co. filed a notice of appeal from the district court's final judgment and memorandum order on December 28, 1979. The district court had indicated during the hearing held on December 28 that it would stay its order for ten days to allow Porter Co. to apply to this Court for an injunction pending appeal. On January 4, 1980, the Fifth Circuit granted Porter Co. an additional five-day stay of the district court's order to allow consideration of Porter Co.'s Emergency Motion for Injunction Pending Appeal; however, the five-day stay was subsequently vacated on January 9, 1980, when this Court denied Porter Co.'s emergency motion. Shortly thereafter MDC awarded Contract Y-621 to Transit."

At the hearing before this Court on the parties' cross-motions for summary judgment, the Court indicated that both sides felt that there was no real factual dispute on the issue of liability, although, of course, the parties disagreed on the legal significance of the uncontested facts *See Transcript of Hearing, November 7, 1984* at 5 and 12. (Docket # 88) Counsel for the litigants agreed that the factual record was undisputed; however, Defendants' counsel sought to raise two additional matters to add to the evidence.

First, DADE COUNTY sought to withdraw two admissions it had made during discovery. The facts

admitted were: "Prior to August 22, 1979, no representative or official of the County or of the United States Department of Transportation made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with Contract Y-621." (Paragraph 60 of H.K. PORTER's First Request for Admissions); "The 5% participation requirement of Y-621 was not based upon a previous investigation or calculation made by MDC or UMTA." The Court refused to allow DADE COUNTY to withdraw the admissions made in 1982, agreeing with H.K. PORTER that the facts had been admitted and that there was no evidence to contradict the admissions.

Second, the County sought to introduce evidence regarding its enforcement of the minority business enterprise requirement in Contract Y-621 on the second lowest bidder, Transit Products, Inc. *See Defendant's Composite Exhibit 3. See also* Footnote 7 *infra.* Although it was undisputed that the County monitored the second-lowest bidder and substituted the original minority subcontractor, Intransco, with a genuine minority business enterprise, Tepcon, Inc., the Court felt that additional evidence and testimony regarding Tepcon, Inc., would not be relevant to the issue of liability in this case as DADE COUNTY's actions were taken after the award of the contract. The good faith actions of the County in taking corrective actions in monitoring the second lowest bidder, Transit Products, Inc.'s, minority subcontractor after the award of the contract to Transit Products, Inc., is not an issue in these proceedings. Accordingly, the Court took no further evidence on matters occurring after the award of the contract but limited itself to the events of 1979, the same matters

which Judge King and Judge Kehoe had considered in the first case, *H.K. Porter v. Dade County,* Case No. 79-4875-CIV-KING. Upon the motion of DADE COUNTY, the Court admitted the entire record in the first case into evidence in this case.

As an overview, the Court notes that not only have the facts remained the same as in the first case, the positions of the parties have remained remarkably consistent since 1979. H.K. PORTER has insisted that the 5% minority business enterprise provision in Contract Y-621 is unfair, unreasonable and not feasible because there were no minority subcontractors who could do the Metrorail work. Articulate in-house and local counsel have explained H.K. PORTER's reasons at every step of the proceedings. The federal agency, the Urban Mass Transportation Administration, Dade County's Contracting Officer, Dr. John Dyer, the Dade County Commission, which voted to award the contract to Transit Products, Inc., and Federal Judge James W. Kehoe, have all disagreed with H.K. PORTER's position.

It is undisputed that the sole reason H.K. PORTER failed to get the Metrorail contract was the 5% minority business provision with which UMTA, Dade County, and Judge Kehoe felt H.K. PORTER had failed to comply. DADE COUNTY has not argued that PORTER lacked the technical ability or finances to perform the contract. DADE COUNTY has stuck to its 5% minority business goal for contract Y-621, arguing that it was willing to pay more for a contractor who could meet the goal and arguing that minority business participation was part of what DADE COUNTY bargained for and

paid for in Contract Y-621. The County's position has remained consistent throughout these proceedings—the 5% goal was feasible and H.K. PORTER failed to comply with the contractual requirement without justification.

To summarize the events of 1979 which lead to this lawsuit, on June 12, 1979, DADE COUNTY, through its agent Kaiser Transit Group, sent advance notice and a contract specifications book to approximately 90 potential bidders for Contract Y-621 (*Plaintiff's Composite Exhibit 1/Defendant's Composite Exhibit 1*). The Contract Specifications Book, approximately 100 pages in length, sent to the bidders prominently contained notice that minority business participation would be required from any successful bidder. *See Plaintiff's Exhibit 1,* "Contract Specifications Book", at page IFB 6, G.P 27-28, Appendix B Section III, p. 1-5). On July 17, 1979, the minority business participation goal for Contract Y-621 was set at 15% (*Defendant's Exhibit 1,* Memorandum from James D. Corbin, Director of Equal Opportunity Division to William A. Skeen, Jr., Contracts Manager). On August 7, 1979, Addendum III was issued and sent to the bidders which set the minority percentage goal for Contract Y-621 at 5% of the price. (*Plaintiff's Exhibit 1,* Bid Form for bid to be opened August 22, 1979 and *Defendant's Exhibit 1,* Memorandum, Stan Burkot of Kaiser Transit Group to file dated August 13, 1979).

DADE COUNTY's engineer estimated the cost of Contract Y-621 at $9,207,800.00. When the bids were opened on August 22, 1979, the County received two excellent bids far below the engineer's cost estimate — H.K. PORTER's bid at $8,076,506.30 (*Plaintiff's Exhibit*

2, H.K. PORTER's bid form) and Transit Products, Inc. bid at $8,373,502.00 (*Plaintiff's Exhibit 3*, Transit Products' bid form). The bids were below estimate and within 3-4% of one another. Insul 8 Corporation, the third bidder, bid $11,063,591.00 for Contract Y-621. Insul 8 was the only other bid received by the County for the contract. The County decided, after extensive proceedings before the compliance monitor and in federal court, to take Transit Products' bid because it contained minority business participation, while H.K. PORTER's bid did not contain minority business participation. *Compare Plaintiff's Exhibit 2* at Appendix B, pp. 11-17 *with Plaintiff's Exhibit 3* at Appendix B, pp. 11-17).

To summarize the position of the parties, H.K. PORTER has never retreated from its view as expressed in the letter attached to the August 22, 1979 bid for Contract Y-621 written by R.E. Lillard, Manager of Transit Programs for H.K. PORTER that no minority subcontractor could do the work required on the Metrorail third-rail contract. (H.K. PORTER left the six pages in Appendix B, "Minority Contractor Participation Provision" on the Bid Form blank, including Mr. Lillard's letter instead). The letter, in its entirety, reads:

> We, the H.K. Porter Company, Inc., as a Corporation do and will adhere to every government requirement as to all EEO regulations and further, we shall attempt to involve as many minority contractors and suppliers as practicable on this program.

Due to the nature of the products as specified in this transit program with regards to the raw products that are required, i.e., steel rail, aluminum extrusions, lockbolts, etc., and the nonexistance of any minority firms in the production of these materials we shall follow the same plan and outlines that we have had approval on other transit programs.

We will appreciate any recommendations that you may have to offer with regards to this program.

R.E. Lillard
Manager, Transit Programs
H.K. PORTER CO., INC.

Plaintiff's Exhibit 2, at Appendix "B" inserted between pages 11 and 12.

Defendant, DADE COUNTY, has consistently characterized the letter as a "vague policy statement" and not in compliance with the contract's 5% minority participation goal. *See, e.g., Plaintiff's Exhibit 4*, Compliance Hearing before Dr. James Corbin, August 29, 1979 at p. 40.

The key factual determination for this Court to make is whether H.K. PORTER has proved that it falls within the "escape provision" of the Metrorail contract contained in Addendum No. 2 to the Contract, "Minority Contractors Provision, III, C: "Determination of Compliance", at pp. 4-5. Addendum No. 3 (*Plaintiff's Composite Exhibit 1*). Although H.K. PORTER claims

it was surprised and prejudiced when Addendum III, which included the 5% minority goal, was sent by DADE COUNTY on August 7, 1979, the Court finds that argument first, not credible, and second, not relevant.

Despite H.K. PORTER's complaint about receiving Addendum III, which allegedly contained "new MBE requirements" only "seven working days" before the deadline for submitting bids on Contract Y-621, the Court finds PORTER must have been aware that federal mass transit projects were going to maintain minority business requirements. The Urban Mass Transportation Administration issued Circular 1165.1, entitled "UMTA MBE Policy and Requirements" on December 30, 1977. (*Plaintiff's Exhibit 8*). As PORTER has noted, H.K. PORTER was one of the few firms in the new mass transit commuter rail industry in the United States. *See, e.g. Plaintiff's Exhibit 9*, Public Hearing, Testimony of Mr. Lillard, at 101-134. Certainly, it must have carefully followed the actions of the UMTA, which provided the bulk of the funds for the projects H.K. PORTER had in Washington, Atlanta, San Francisco, Boston, and Chicago, as well as in Miami. The 1977 Circular stated: "It is UMTA policy that MBE's shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." *Plaintiff's Exhibit 8*, UMTA Circular 1165.1 at 2. Under the section entitled "basis for approval", the Circular said that the required MBE programs for federally-funded mass transit programs "shall include, at a minimum . . . percentage goals for the dollar value of work to be awarded MBEs." *Plaintiff's Exhibit 8* at 4, Number 5(a)(3). H.K. PORTER could reasonably have been surprised at the 5% goal in Contract Y-621 only

in the sense that that 5% goal was not higher. PORTER should have known that a specific goal for minority participation, rather than the unspecified general "best efforts" requirement for MBE involvement, would be required for Contract Y-621 in light of the Urban Mass Transit Administration's 1977 policy statement.

DADE COUNTY's incentive for setting a percentage of the value of the work to be awarded to MBEs in Contract Y-621 is clear and also contained in Circular 1165.1—"Failure to carry out the approved minority business enterprise action program shall be a breach of this Contract and may result in the termination of this grant, and preclude the Public Body from receiving further financial assistance under the Urban Mass Transportation Act or such other remedy as the Government deems appropriate". *Plaintiff's Exibit 8*, at pp. 6-7.

Second, H.K. PORTER's argument about the timing of its receipt of Addendum III is not relevant because PORTER's position has consistently been that no minority subcontractors existed. Therefore, no amount of additional time would have assisted H.K. PORTER under its view of the facts. Finally, H.K. PORTER did not request an extension of the bid deadline, unlike Transit Products.

Therefore, H.K. PORTER's case on its compliance with the contract, leaving aside the legality of UMTA and DADE COUNTY's 5% goal, rests on whether H.K. PORTER fell within the "escape provision" of the contract. If H.K. PORTER met the requirements for the escape provision, DADE COUNTY would be in violation

of the law and its own rules for awarding the Metrorail contract to the second-lowest bidder, Transit Products. Even though the bids were extremely close, DADE COUNTY is required to award public contracts to the lowest qualified bidder.

The "escape provision" is contained in Addendum III, Appendix B "Minority Participation Provision", Part III "Bidding Requirements and Procedures Prior to Contract Award", ¶ C "Determination of Compliance" (*Plaintiff's Exhibit 1*, Addendum No.3, pp. 4-5) It reads, in its entirety, as follows:

> C. *Determination of Compliance*—the total price for work to be performed by Minority Contractors as indicated in each Bidder's Schedule for Participation by Minority Contractors is required to be sufficient to fulfill the stated goal, unless the Bidder shall demonstrate to the satisfaction of MDC that:
>
> 1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
>
> 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not Qualified or were Unavailable; and

3. it included in its Schedule such proposed agreements as could be made with such efforts.

MDC shall not award a Contract to any Bidder which it determines fails to comply with the applicable requirements of this Provision. Nothing herein shall relieve any Bidder or any Contractor performing any work under the Contract from any of the terms, conditions or requirements of the Contract or modify MDC's rights as reserved in the Contract Documents.

It is undisputed that H.K. PORTER did not include any proposed agreements in its bid form—the pages were left blank. *See Plaintiff's Exhibit 2.* It is undisputed that H.K. PORTER did not contact any minority contractors in an attempt to subcontract work for Contract Y-621. *E.g., Plaintiff's Exhibit 9* at 54. Therefore, provisions ¶¶ C(1) and C(3) are not applicable to this determination of liability for the Metrorail contract at issue in this case. The key provision is ¶ C(2) and H.K. PORTER's contention that it was unable to achieve the stated 5% goal because minority contractors were not qualified or were unavailable.

H.K. PORTER has consistently maintained that the contact rail contract for Metrorail had to be done in-house at H.K. PORTER's special facility in Chicago, with the only subcontracting-out possibility being the provision of raw materials, for which no minority sub-contractros existed. As Lawrence E. Moncrief, H.K. PORTER's Assistant Counsel stated at the very first of many hearings in this case, the Compliance Hearing before Mr. James Corbin on August 29, 1979:

> Again, because of the nature of the process of making these rails, we feel that the only sub-out possibilitty would be the supply materials because it is a fairly sophisticated process to make this kind of rail. The only thing we feel we could sub-out would be the supply material and it is our opinion that no minority is out there who could do the job. There are no minorities who can supply aluminum extrusions. No minority contractor that extrudes aluminum to the shape we need. We have to buy it from a proprietary, the item, from those who make it. That is about it.

Plaintiff's Exhibit 4, "Compliance Hearing for Contract Y-621 H.K. Porter Company, Inc.", at 45-46.

Mr. Gerhard O. Mietz, General Manager of H.K. PORTER's Chicago Works, where the Metrorail contract was to be performed, stated that Contract Y-621 called for four basic components: (1) steel rail, (2) two aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste applied to the interface of aluminum and steel. *Plaintiff's Exhibit 9*, "Minority Business Enterprise Public Hearing, Re: H.K. Porter Company, Inc." November 28, 1979 at 11.

Mr. Richard E. Lillard, Manager of H.K. Porter's Transit Programs, Electrical Division, testified that he was experienced in various contact rail contracts in connection with the bidding process, procurement of supplies, and work decisions.

Plaintiff's Exhibit 9, November 28, 1979 Hearing at p. 21. Mr. Lillard testified that no minority firms produced the four major components nor the minor components needed for H.K. PORTER's in-house assembly of the rail. *Plaintiff's Exhibit 9* at 33-51.

At the Public Hearing, the following exchange took place between Dr. John Dyer, Contracting Officer and Mr. Donald K. Moe, Vice-President, General Manager, Electrical Division, H.K. PORTER COMPANY, INC.:

> Dr. Dyer: Prior to submitting your bid on Contract Y-621, did Porter affirmatively consider the possibility of contracting any or all of that remaining work to minorities or any other subcontractors, for that matter?
>
> Mr. Moe: Yes, we do and did.
>
> Dr. Dyer: What was your decision?
>
> Mr. Moe: It was negative, and I would like to tell you why that decision was negative.
>
> Dr. Dyer: Then why don't we let you go ahead and do that.
>
> Mr. Moe: Dr. Dyer, in addition to the facilities that have been discussed and related to the appurtenances and so forth, the Porter Company has made a million dollar commitment to the future of the third-rail electrification, and, this is an important part

> of the cost for the product you and other people in this business of putting new systems in require by both your specifications and actual application need.
>
> I have a layout diagram of a 17,000 square foot addition completed in February of 1979 to our H.K. Porter facility at roughly 2500 West Fulton Street, in Chicago, Illinois, and I would like to use nine photographs in walking my way through the facility to explain the process and the processes and the facility's value to the products involved in the production process.

(Mr. Moe proceeded with photographic slides showing the new facility in Chicago). *Plaintiff's Exhibit 9* at 54-55.

H.K. PORTER was able to comply with MBE requirements in Baltimore from its plant in Lynchburg, Virginia by hiring minority-owned trucking firms. For the Miami Metrorail project, Mr. Moe stated it was not commercially feasible to send the product to Miami from H.K. PORTER's plant in Chicago via truck; the transportation had to be done by rail. *Plaintiff's Exhibit 9* at 63.

Plaintiff's counsel has persuasively and vigorously argued that, on the basis of the facts discussed above, H.K. PORTER was not able to find qualified minority subcontractors because of its in-house assembly in Chicago. *Plaintiff's Exhibit 9* at 82-90 (Closing argument of Mr. Charles Kline before Dr. Dyer); *Plaintiff's Exhibit 15* Hearing before Judge Kehoe December 19, 1979 at

27 (Argument by Mr. Kline that H.K. PORTER made a calculated risk and decided it would be cheaper to fabricate the entire product in-house except for a handful of raw materials); *Plaintiff's Exhibit 16* Hearing before Judge Kehoe December 20, 1979 at 29 (Mr. Kline's argument that PORTER's high fixed-cost for the Chicago plant placed it at a disadvantage for subcontracting compared to a firm without a plant and overhead). *Transcript of Hearing* November 7, 1984 (Docket # 88) at 47-51 (Mr. Kline's argument that commercially impossible for PORTER to subcontract fabricator process and no qualified minorities available for transport of raw materials). *Cf. Plaintiff's Exhibit 10* (high percentage of minorities in Plaintiff's Chicago plant).

IV. H.K. PORTER NOT IN COMPLIANCE WITH CONTRACT'S ESCAPE MECHANISM

On the mixed question of law and fact regarding H.K. PORTER's compliance with ¶ C(2) of the escape provision,[5] the Court concludes that PORTER made a calculated risk investing in its in-house facility which made it difficult for PORTER to sub-contract out part of the work for Contract Y-621. However, the Court does not find that PORTER's in-house facility made PORTER unable to achieve the state 5% goal because "minority contractors were not qualified or were unavailable." Rather, PORTER's business decisions made it commercially unfeasible for PORTER to subcontract. Even accepting PORTER's contention that it could not subcontract even 5% to minorities, the Court does not believe DADE COUNTY was compelled to find PORTER in compliance simply because of PORTER's

internal business structure. It is not this Court's function to rewrite Contract Y-621 and strike the MBE provision or to excuse PORTER from its effect because of PORTER's excellent record of minority employment at its plants and that the particular plant in Chicago employed 33 workers, all of whom were minorities. There is no general constitutionally-compelled property right to government contracts which would have required DADE COUNTY to accommodate the internal business structure of one of the bidders for a contract. *Cf. Economic Development Corporation of Dade County v. Stierheim*, ____ F.2d ____ (11th Cir. 1986) (decided February 20, 1986) (Contractor's contract with county to distribute federal funds not property interest within the meaning of XIV Amendment). This Court agrees with the determination that H.K. PORTER was not in compliance with the Minority Business Enterprise requirement made by six previous levels of review—the Compliance Monitor, the Contracting Officer, the Urban Mass Transportation Administration's Atlanta regional office and UMTA's Washington office, the Dade County Commission, and United States District Judge Kehoe. *See, e.g., Defendant's Exhibit 2* (letters from Mr. Williams and Mr. Richardson); *Memorandum Order of Judge Kehoe* (December 28, 1979).

Therefore, DADE COUNTY had the right to choose the $8.3 million bidder, Transit Products, Inc., over the $8.1 million bidder H.K. PORTER. Transit Products designated in advance, as required, minority business enterprise subcontractors in its initial bid, unlike H.K. PORTER. *See Plaintiff's Exhibit # 3* (Transit Products, Inc., bid form, at Appendix B, pp. 11-17). DADE COUNTY made it clear that MBEs listed on the bid

form were only "proposed" or "initial" minority firms until investigated. *See Plaintiff's Exhibit 5* at 8 (Compliance Hearing September 5, 1979 before Dr. Corbin). Dr. Corbin expressed considerable skepticism about the genuineness of Intransco as a minority enterprise at the compliance hearing on Contract Y-621 within two weeks of the opening of the bid. *See Plaintiff's Exhibit 5*, at p.9 (Compliance Hearing September 5, 1979). H.K. PORTER's tactic in this case has been to put Intransco on trial. The matter of Intransco is as irrelevant to these cross-motions for summary judgment on liability as the subsequent follow-through by DADE COUNTY in enforcing the MBE goal upon Transit Products. Instead, Transit Products, Inc.'s willingness to abide by the 5% goal, and its willingness to substitute Intransco with another firm to comply with the contract, is the matter which is truly relevant to Defendant's liability.

Transit Products steadfastly has maintained that they would comply with the MBE requirement, even if it meant that Intransco would be substituted with another firm. On September 5, 1979, at the Compliance Hearing before Dr. James Corbin, Director of Equal Employment Opportunity, the following exchange took place between Dr. Corbin on the one side and on the other side Mr. Hugh M. Mize, Jr. and D.G. Thomson, respectively, President and Vice-President of Transit Products, Inc.

> Dr. Corbin: Are you prepared to make that substitution [if Intransco is found not to be a minority firm] after being instructed by us?

Mr. Thomson: I think we might have some difficulty getting the technology, but I am convinced we can put it together.

Dr. Corbin: So, your answer to whether or not you are prepared to make a substitution is . . .

Mr. Mize: Yes. We prefer not to. We hope these people qualify.

Plaintiff's Exhibit 5 at 8.

On December 7, 1979, the following exchange took place between Dr. John Dyer, Contracting Officer and Transit Product's President, Mr. Mize:

Dr. Dyer: You said, in effect, that in the event there were problems with Intransco in terms of it being legitimately a minority business enterprise, you, one, would be willing to substitute and, two, you felt confident you could substitute.

Mr. Mize: That's correct.

Plaintiff's Exhibit 11 at 8.

This contract award to Transit Products was under continual scrutiny during 1979 by the legislative and executive political branches of the local government—The Dade County Commission and the administrative mass transit agency—as well as the federal executive branch (The UMTA) and the federal judicial branch

(United States District Court). Again, the position of H.K. PORTER has remained consistent since August 1979—adamantly insisting that no minority subcontractors existed, while Transit Products listed minority businesses in its bid proposal and indicated willingness to substitute another MBE, should Intransco be found not to be a legitimate minority business enterprise. Therefore, the decision to award Metrorail Contract Y-621 to Transit Products was valid, if the MBE provision was valid.

The final question is whether the MBE requirement itself was constitutional. UMTA Circular 1165.1, effective March 1, 1978 (more than one year before the contract in question) cited eight separate sources of authority for the MBE goal: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1; (2) Section 12(f) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f); (3) 49 C.F.R. Part 21; (4) 28 C.F.R. Part 42, Subpart F; (5) Executive Order 11625 (October 13, 1971); (6) Department of Transportation Order 4000.7 "Minority Business Enterprise Program" (March 26, 1975); (7) Department of Transportation Order 1000.12 "Implementation of the Department of Transportation's Title VI Program" (January 19, 1977); and (8) Federal Management Circular 74-7 "Uniform Administration Requirements for Grants-in-Aid to State and Local Governments" (September 13, 1974). *See Plaintiff's Exhibit 8* Urban Mass Transportation Administration Circular 1165.1 "MBE Policy and Requirements for Grant Recipients" at page 1-2. The Court will now turn to the question of whether the 5% minority goal in Contract Y-621 was unconstitutional or otherwise illegal.

V. CONCLUSIONS OF LAW

The minority business enterprise goals at issue in this litigation were mandated by the federal government as a condition of its participating in financing 80% of Metrorail's construction costs. The Urban Mass Transportation Act, 49 U.S.C. App. §§1601-1618 refers to Title VI of the 1964 Civil Rights Act[6] in prohibiting discrimination "under any project, program or activity funded in whole or part through financial assistance" under the Urban Mass Transportation Act. 49 U.S.C. App. §1615(a)(1). Metrorail was such a project funded by the federal government under the Urban Mass Transportation Act. The Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with subsection (a)(1) of the Act. 49 U.S.C. §1615(a)(2) ("The Secretary *shall* take affirmative action to ensure compliance"). Pursuant to the federal requirements, DADE COUNTY's bid invitation for the Metrorail contract at issue included Addendum 3 (the 5% minority business enterprise goal) in response to the Secretary of Transportation's Order 4007.7A and the Urban Mass Transportation Administration's Circular 1165.1. The Court declines to find the provisions in the Act unconstitutional, nor does the Court find the Secretary's order unconstitutional, or DADE COUNTY's contract addendum facially unconstitutional. In light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination. DADE COUNTY's modest 5% minority business enterprise goal—not quota—for the Metrorail contract was a valid implementation of Congressional policy.

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Supreme Court upheld a minority business enterprise provision of the Public Works Employment Act of 1977, 42 U.S.C. §§6701-6736, which required at least 10% of any local public works project to be set aside for minority business enterprises. As Defendants correctly note, the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against constitutional challenge in *Fullilove*. Further, the minority business enterprise goal is not a strict quota of the sort found violative of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Constitution by the Supreme Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The Metrorail contract allowed for a waiver of the 5% minority business enterprise goal, a provision that amounted to an escape mechanism by which H.K. PORTER could justify its inability to meet the 5% goal. At the hearing conducted by JOHN A. DYER, the transportation authority concluded that Plaintiff was not in compliance with the bid invitation's minority contractor participation provisions. H.K. PORTER failed to contact a single minority business in the course of preparing its bid, seeking to justify its inaction by asserting that there were no minority businesses in existence which could perform any portion of the contract work. H.K. PORTER's bid was rejected, and upon administrative review by the Department of Transportation's Urban Mass Transportation Administration, Carl B. Richardson, Acting Director, wrote a letter dated December 17, 1979 to Defendant DYER concurring in the award of the Metrorail contract

to the second lowest bidder, Transit Products, Inc. *See Defendants' Composite Exhibit 2.*

The Court has reviewed the transcript of the hearing and concludes, as did Judge Kehoe nearly six years ago, that the hearing complied with constitutional due process requirements. H.K. PORTER presented its claim that one of the two proposed minority contractors in Transit Products' bid (Intransco) was not a true minority contractor, yet could not explain away its own total non-compliance.[7]

Defendant DYER's refusal to waive the 5% minority business enterprise goal is justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors. DYER's actions did not violate Florida administrative law, due process, nor were they arbitrary or capricious. *See South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County*, 723 F.2d 846, 850 (11th Cir. 1984)[8] (Pendent Florida due process and equal protection claims judged constitutional claims because Florida Supreme Court has held tht Florida's due process and equal protection guarantees confer the same protection as their federal counterparts).

Therefore, H.K. PORTER was not entitled to receive the Metrorail contract in question, nor were Plaintiff's legal rights violated by DADE COUNTY when the Defendant awarded the contract to another business. Defendants' motion for summary judgment is granted on the basis that Defendants are not liable to Plaintiff for any alleged damages resulting from the award of Contract Y-621.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of May, 1986.

/s/ Edward B. Davis
UNITED STATES DISTRICT JUDGE

cc: Charles C. Kline, esq.
Robert A. Cuevas, Jr.

FOOTNOTES

[1] Addendum 3 provides in pertinent part that a bidder was required to *either*:

> (a) involve minority business enterprises (MBE's) in five percent of the contract work; or
>
> (b) demonstrate that:
>
> > "1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
> >
> > 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not qualified or were Unavailable; and . . .". (Section IIIC of Appendix B p. 4, Plaintiff's Exhibit 1F, admitted in evidence October 19, 1979).

MDC had promulgated this provision in response to DOT's Secretary Order 4000.7A and UMTA's Circular 1165.1 which sought to clarify DOT's MBE's policy and requirements for UMTA grant recipients. An MBE was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

(Footnote by Court of Appeals)

[2]Porter Co.'s preliminary injunction motion was not ruled on by Judge King; however, Porter Co. was granted a summary judgment which provided essentially the same relief sought by the injunction. (Footnote by Court of Appeals)

[3]He specifically found (1) Porter Co. failed to make every reasonable effort to contact and negotiate with MBE's other than by telephoning and corresponding with its already existing suppliers, (2) Porter Co.'s argument that no capable MBE's existed was refuted by Transit's bid submission and (3) Porter Co. failed to identify MBE's it intended to utilize prior to submission of its bid as required. (Footnote by Court of Appeals)

[4]Because Judge King was unavailable to hear Porter Co.'s second motion for an emergency TRO, the case was reassigned to Judge Kehoe who made the order that is the subject of this appeal. (Footnote by Court of Appeals)

[5]The Court has previously found provision C(1) and C(3) not applicable to the facts of this case. *See supra* at 16-17.

[6]Title VI of the Civil Rights Act of 1964 states, "No person, in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[7]Intransco was replaced as a supplier for the Metrorail contract by the firm of Tepcon, Inc., when James D. Corbin, Director of the Equal Opportunity Division for the Defendant, concluded that Intransco was not a legitimate minority business enterprise on December 18, 1979. The contract was completed with subcontract awarded to two minority business enterprises—Shield Electric

Company and Tepcon, Inc.—despite Plaintiff's claim that no minority firms were available to do the subcontracting work. The total amount of the minority business enterprise subcontracts amounted to $424,998.40 ($54,998.40 to Shield and $370,000.00 to Tepcon), an amount slightly in excess of the Defendants' 5% minority business enterprise goal.

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[8]The Eleventh Circuit, in *Associated Contractors*, upheld a waiver of the competitive bidding process to allow bidding among black contractors for the Earlington Heights Metrorail station. The Court upheld a 100% black set-aside and 50% black subcontractor goal. The contract bid invitation in *Associated Contractor* was far more burdensome than the 5% minority goal at issue in this case and demonstrates the lack of merit of Plaintiff's claims in this Circuit. Furthermore, *Associated Contractors* dealt with the Defendants' powers as a county under state law. In this case, the Defendant is in even a stronger legal position because it has acted pursuant to Congressional and Executive authority.

Plaintiff argues that the County was required to make a detailed finding of past discrimination before awarding Contract Y-621, with its 5% minority business enterprise requirement, using the three-factor test in *Associated Contractors* at 851-852. Plaintiff's argument fails because the "proper governmental body" with the authority to pass the legislation in question which lead to the MBE provision in Contract Y-621, was Congress as implemented by the federal executive branch. *Associated Contractors* tested the authority of Dade County's commission to pass an ordinance. In *Associated Contractors*, the Eleventh Circuit added to the unbroken string of decisions affirming the power of Dade County to remedy discrimination by approving 100% minority set-aside contract. *See also generally J.A. Croson Company v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985) (recent 4th Circuit case relying on *Associated Contractors* to uphold city's power to legislate 30% minority set-aside for public contracts). Neither Congress, nor state and local government, are constitutionally required to make separate, lengthy, independent investigations of discrimination before requesting bids on each of the thousands of contracts made each year involving federal funds and containing goals for minority participation.

[1355]

J.A. CROSON COMPANY, Appellant,

v.

CITY OF RICHMOND, Appellee,

Associated General Contractors of America,
Amicus Curiae.

J.A. CROSON COMPANY, Appellee,

v.

CITY OF RICHMOND, Appellant,

Associated General Contractors of America,
Amicus Curiae.

Nos. 85-1002, 85-1041.

United States Court of Appeals, Fourth Circuit.

July 9, 1987.
Rehearing and Rehearing En Banc
Denied Sept. 18, 1987.

Contractor whose bid had been nullified filed action for injunction, declaratory [1356] relief, and damages, challenging city's minority business utilization plan for public contracts. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., ruled in favor of city. Contractor appealed. The Court of Appeals, 779 F.2d 181, affirmed. The Supreme Court,

106 S.Ct. 3327, remanded. The Court of Appeals, Wilkinson, Circuit Judge, held that city plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, violated equal protection clause.

Reversed and remanded.

Sprouse, Circuit Judge, filed a dissenting opinion and would have granted rehearing.

1. Civil Rights —3

To show that a municipal plan is justified by compelling governmental interests, municipality that wishes to employ racial preference cannot rest on broad-brush assumptions of historical discrimination.

2. Constitutional Law —215.2

Municipal Corporations —356

City's minority business utilization plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, violated equal protection clause; there was no showing of past discrimination against minority firms, such as was necessary to permit racial preference to stand. U.S.C.A. Const. Amend. 14.

3. Municipal Corporations —356

Even assuming the city's minority business utilization plan, which required contractors on city construction projects to subcontract at least 30% of dollar value of contract to minority-owned business enterprises unless city waived requirement, was justified by need to remedy prior discrimination, plan was invalid because it was not narrowly tailored to that remedial goal. U.S.C.A. Const.Amend. 14.

Walter H. Ryland (Williams, Mullen & Christian, Richmond, Va., on brief), for appellant/cross-appellee.

Reginald M. Barley, Sr. Asst. City Atty. (Michael L. Sarahan, Asst. City Atty., Richmond, Va., on brief), for appellee/cross-appellant.

Michael E. Kennedy, McLean, Va., for amicus curiae.

Before HALL, SPROUSE, and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

This case is now before us on remand from the Supreme Court. It involves a challenge to the Minority Business Utilization Plan enacted by the City Council of Richmond, Virginia. The plan requires contractors on city construction projects to subcontract at least thirty percent of the dollar value of the contract to minority-owned business enterprises (MBE's) unless the city waives the requirement. This court earlier upheld

the plan under Virginia law and the federal Constitution.

The Supreme Court granted certiorari, vacated the judgment, and remanded the case for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). We now hold that the Richmond plan is invalid under the Equal Protection Clause of the Fourteenth Amendment.

I.

The Minority Business Utilization Plan, enacted in April of 1983, sets aside part of the city's construction expenditures for minority-owned businesses. The plan terminates in 1988, at which time the City Council can renew it or allow it to lapse. Under the plan, the prime contractor must subcontract at least thirty percent of the dollar value of the contract to firms that are at least one-half minority owned. Every construction contract includes provisions setting out the MBE requirement and the procedures for complying with it. The contract provisions state that if a contractor fails to meet the MBE requirement, the [1357] contract "shall be suspended or terminated unless a waiver is granted." They further state that the city will not waive the requirement "other than in exceptional circumstances." Only non-minority prime contractors must comply with the plan provisions.

In September of 1983, the city invited bids for the installation of stainless steel urinals and water closets at the City Jail. The J.A. Croson Co., which is not itself an MBE, was the only bidder on the contract. After Croson submitted its bid for the project, it requested a

waiver of the MBE requirement. Croson contended that it was unable to locate any minority subcontractors, except one that it considered unqualified. The city refused to grant a waiver. Croson then informed the city that if it were required to use the unqualified contractor, the cost of the project would rise by $7,663.16, and the contract price would have to rise accordingly. The city again turned Croson down, stating that the minority contractor was qualified and that the fixed price bid could not be increased.

Shortly thereafter, the city informed Croson that it had decided to re-bid the project. Croson was invited to submit a new bid. Croson then sued in federal district court, arguing that the plan's racial set-aside was contrary to Virginia law governing competitive bid procedures and that it violated the federal Constitution. Croson brought its federal claims under 42 U.S.C. §§ 1981 and 1983.

The district court ruled that the plan was consistent with both Virginia law and federal law. A divided panel of this court affirmed. *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir.1985). After this court announced its decision, the Supreme Court decided *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). The Supreme Court granted certiorari in the *Croson* case and remanded it to us for further consideration in light of *Wygant*. *See* ___ U.S. ___, 106 S.Ct. 3327, 92 L.Ed.2d 733 (1986).

Wygant involved a challenge to a preferential layoff provision in a collective bargaining agreement for school teachers. The agreement stated that if the Board of

Education needed to lay off any teachers, those with the most seniority would be protected, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." 106 S.Ct. at 1845. The Court upheld this provision unconstitutional, principally because the racial preference was not justified by adequate findings of prior discrimination and because it was not narrowly tailored to its asserted remedial purpose.

After reconsidering our decision in light of *Wygant*, we conclude that we must invalidate the racial preference in the Richmond plan. The very infirmities which marked the preferential provision in *Wygant* are present in this case.

II.

[1] Because the views of the majority in *Wygant* were expressed in a plurality opinion and two concurrences, the boundaries of *Wygant* will no doubt be a matter of dispute.[1] There should be no dispute, however, about the core of its holding: To show that a plan is justified by a compelling governmental interest,

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[1]Unless otherwise noted, the references to *Wygant* herein refer to the plurality opinion. The plurality opinion of Justice Powell was joined by Chief Justice Burger and Justice Rehnquist; it was also joined in part by Justice O'Connor, who wrote separately. Justice White concurred in the judgment and wrote separately.

Our analysis of the Richmond plan comports, we believe, with the views expressed in all three opinions. Although Justice White did not elaborate in *Wygant* on the requirements of particularized findings and narrowly tailored means, he certainly did not indicate

a municipality that wishes to employ a racial preference cannot rest on broad-brush assumptions of historical discrimination. Yet that is exactly what the Richmond City Council did in this case. If this plan is held to be valid, [1358] then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race. It is precisely to guard against this latter abuse that the *Wygant* requirement of particularized findings is essential.

A.

According to the *Wygant* plurality, before an asserted governmental interest in a racial preference can be accepted as "compelling," there must be findings of prior discrimination. Findings of *societal* discrimination will not suffice; the findings must concern "prior discrimination *by the government unit involved*" (emphasis added). *Wygant*, 106 S.Ct. at 1847. Moreover, if this finding is to be drawn from mere statistical evidence, that evidence cannot just show a disparity between the percentage of minorities in some activity (e.g., employment in public schools or awarding of public contracts) and the percentage of minorities in the community. It must instead focus on the population that is relevant for comparative purposes, such as the percentage of minorities in the local labor force or the

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(Footnote 1 Continued)

that he would permit localities greater latitude in this regard than Justices Powell and O'Connor. Of critical importance is the fact that five Justices concurred in the judgment that the racial preference in *Wygant* was unconstitutional.

construction business. *Id.* at 1847-48; *see also Johnson v. Transportation Agency, Santa Clara County*, ___ U.S. ___, 107 S.Ct. 1442, 1452, 94 L.Ed.2d 615 (1987); *Hazelwood School District v. United States*, 433 U.S. 299, 308 & n. 13, 97 S.Ct. 2736, 2742 & n. 13, 53 L.Ed.2d 768 (1977).[2]

The Supreme Court in *United States v. Paradise*, ___ U.S. ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) and *Local 28 of Sheet Metal Workers v. EEOC*, ___ U.S. ___, 106 S.Ct. 3019, 92 L.Ed2d 344 (1986), reemphasized this need for a suitable basis for remedial action. In both of these cases, the Court upheld race-conscious relief imposed by district courts where the offending institutions had a history of discriminatory conduct. In *Paradise*, for example, the Court reviewed that institutional history in painstaking detail, noted the "four decades" during which blacks had suffered total exclusion from all positions in the Alabama Department of Public Safety, and concluded that the "pervasive, systematic, and obstinate discriminatory conduct of the Department" justified the race-conscious relief ordered by the district court. 107 S.Ct. at 1065 (opinion of Brennan, J.). While *Wygant* involved voluntary action and *Paradise* and *Sheet Metal Workers* involved court-ordered remedies, there was in all those cases a substantial basis for believing that remedial action was required.

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[2]The Supreme Court's decision in *Johnson, supra*, does not alter *Wygant's* requirement of a showing of prior discrimination. The *Johnson* Court addressed only a Title VII claim, not a Fourteenth Amendment claim such as the one now before us. The Court stated that if a Fourteenth Amendment claim were before it in *Johnson*, the *Wygant* standard would come into play. 107 S.Ct. at 1446 n. 2; *id.* at 1449-50 n. 6.

[2] Here, by contrast, proceedings before the City Council failed to establish the basis for remedial action. The debate, at the very end of a five-hour council meeting, revealed no record of prior discrimination by the city in awarding public contracts, aside from some conclusory and highly general statements made by a member of the public, a City Council member who supported the plan, and the City Manager. The member of the public who testified about discrimination was not even involved in the construction industry. The City Manager's comments mainly had to do with the city of Pittsburgh. Such meager evidence is not a sufficient finding of prior discrimination. The proceedings betray the very casualness about the use of racial distinction in public enactments that *Wygant* warned against.

The only other evidence purporting to show discrimination in the assignment of contracts compared the percentage of minority contracts with the total number of minority residents in the community. Statistical records were said to indicate that minorities comprised 50% of Richmond's population but that minority-owned firms had received only 0.67% of the dollar value of Richmond's prime contracts. General [1359] population statistics suggest, if anything, more of a political than a remedial basis for the racial preference. According to the plurality in *Wygant*, this is exactly the kind of evidence that will not pass muster.

The appropriate comparison is between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties. Showing that a small fraction of city contracts went to minority firms, therefore, does not itself demonstrate discrimination;

both sides agree that the number of minority-owned contractors in Richmond was also quite small. *Wygant* rejected a similar comparison in an employment context:

> There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications.

106 S.Ct. at 1838.

Our holding today is likewise consistent with that of the Sixth Circuit in *J. Edinger & Son, Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir.1986). In *Edinger*, the city of Louisville enacted a program to grant preferential treatment to racial minorities, women, and the handicapped in awarding its supply and service contracts. There, as in the present case, the need for the program was justified principally by general population statistics. Because general population statistics failed to address the "statistical disparity between the percentage of qualified minority business contractors doing business in Jefferson County and the percentage of bid funds awarded to those businesses," the Sixth Circuit found that the program did not comport with *Wygant*, 802 F.2d at 216. *Accord Associated General*

Contractors of California v. San Francisco, 813 F.2d 922 (9th Cir.1987).

We do not suggest that the City Council should be held to as high a standard in its factfinding as, say, a federal district court. Justice O'Connor, in her concurrence in *Wygant*, identified the problems with requiring an extended *mea culpa* from localities seeking to eliminate a historical pattern of discriminatory practice. Legislative findings are, moreover, different from judicial ones; the City Council need not have produced formal, contemporaneous findings, so long as it had "a firm basis for believing that remedial action is required." *Wygant*, 106 S.Ct. at 1853 (O'Connor, J., concurring in part and concurring in the judgment).

In this case, however, the city has failed to show such a firm basis, either contemporaneously or at the district court level. The able trial judge could not point to any evidence beyond that relied upon by the City Council—namely, the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the city's racial preference.

In sum, the omissions in this case overshadow the evidence. There has been no showing that qualified minority contractors who submitted low bids were passed over. There has been no showing that minority firms were excluded from the bidding pool. *Edinger*, 802 F.2d at 216. There has been no showing—only the loosest sort of inferences—of past discrimination, without which *Wygant* does not permit a racial preference to stand.

The record in this case suggests that the City Council thought it was permissible simply to adopt the contract set-aside program upheld by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980). Much of the discussion in the hearings was apparently based on that premise, and some aspects of the Richmond plan follow the *Fullilove* set-aside to the letter. If the City Council did rely on that premise, it was in error. National findings do not alone establish the need for action in a particular locality. If they did, the *Wygant* Court's rejection of [1360] societal discrimination as a basis for remedial action would be undercut. For a locality to show that it enacted a racial preference as a remedial measure, it must have had a firm basis for believing that such action was required based on prior discrimination by the locality itself. The Court upheld the set-aside in *Fullilove* based on Congress's well-founded belief that such a program was needed at the federal level; the Court emphasized the special competence of Congress to act on such a finding. 448 U.S. at 483, 100 S.Ct. at 2777; 448 U.S. at 499-502, 100 S.Ct. at 2785-87 (Powell, J., concurring). Localities cannot disregard the line between remedial measures and political transfers by adopting the *Fullilove* program as though it were boilerplate.

B.

The record of prior discrimination supporting the Richmond plan is deficient. Its deficiency is made more clear by comparison with plans considered in other circuits. For example, in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.1981), the record of prior discrimination supporting the racial preferences included reviews by

the Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) and also a successful Title VI suit in federal district court. A similar record supported the preference in *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894 (3d Cir.1984).

In *Associated General Contractors v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir.1984), the locality had "reliable, substantial information compiled by independent investigations" that showed "*identified discrimination* against Dade County black contractors. . . ." *Id.* at 853 (emphasis in original). The court in *Ohio Contractors Assoc. v. Keip*, 713 F.2d 167 (6th Cir. 1983), found that the state's racial preference was a remedial measure partly because the legislators

> were informed of the findings of racial discrimination in state contracting made in connection with an earlier joint resolution of the legislature and the contents of the report of a special 'task force' established by the state attorney general which found a severe numerical imbalance in the amount of business the state did with minority groups.

Id. at 171. The court went on to describe various studies comparing the volume of minority contracts with the number of minority *businesses*, rather than the minority population as a whole.

Finally, in *Fullilove*, the Supreme Court noted that Congress's decision to enact a minority set-aside for federal contracts was supported by reports of congressional committees, the U.S. Civil Rights Commission, and the General Accounting Office. *See*

448 U.S. at 465-67, 100 S.Ct. at 2768-69; *id.* at 503-06, 100 S.Ct. at 2787-89 (Opinion of Powell, J.).

Of course, we do not intimate any view on the adequacy of the plans described in *Valentine, Kromnick, Associated General Contractors*, and *Ohio Contractors*. These cases were all decided prior to the *Wygant* decision. We note only that the support offered for the Richmond plan is extremely weak in comparison. The plan was not supported by any impartial report, any meaningful statistical evidence, or even by anecdotal allegations of prior discrimination. Based on such a record, we cannot uphold the plan as a remedial measure under *Wygant*. If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future.

III.

[3] Even if we accepted that the Richmond racial set-aside was justified by a need to remedy prior discrimination, the plan still fails because it is not narrowly tailored to that remedial goal. It is of central importance to equal protection under law that public distinctions between citizens on the basis of their race be narrowly and specifically framed. *Wygant*, 106 S.Ct. at 1849-50. The thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned. The figure simply emerged from the mists. The combination [1361] of a large set-aside and a small number of actual minority beneficiaries presents a special potential for abuse. As such, it imposes an

overbroad competitive burden on non-minority businesses.

The competitive disadvantage is far greater than the thirty percent minimum set-aside suggests. In many construction contracts, the dollar allocation among subcontractors will not break into a thirty percent block. If, for example, a project required three subcontractors whose respective efforts represented 55, 25, and 20 percent of the total project cost, compliance with the Richmond ordinance could come only by awarding 55 or 45 percent of the total dollar amount to racially preferred businesses. In this case, the supply of plumbing fixtures represented 75 percent of the cost of the total project, an amount Croson was obliged to award to a minority enterprise in order to meet the minimum 30 percent set-aside. Such means "unnecessarily trammel the rights of innocent individuals directly and adversely affected by a plan's racial preference." *Wygant*, 106 S.Ct. at 1854 (Opinion of O'Connor, J.). The disadvantage is further compounded by the fact that minority prime contractors are exempt from the higher construction costs often imposed by the MBE subcontract set-aside while non-minority primes are subject to them. Richmond City Code, Ch. 24.1, Art. VIII-A(A).

In addition, the definition of minority-owned business is itself not narrowly tailored to the remedying of past discrimination. The Richmond plan defines "minority group members" as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." This definition nearly duplicates the definition that drew fire in *Wygant:*

> The Board's definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent . . . further illustrates the undifferentiated nature of the plan. There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified. Moreover, respondents have never suggested—much less formally found—that they have engaged in prior, purposeful discrimination against members of each of these minority groups.

106 S.Ct. at 1852 n. 13.

The same aggregation problem is present in the Richmond plan. A record of prior discrimination against blacks by a governmental unit would not justify a remedial plan that also favors other minority races. The need for this kind of narrow tailoring, like the need for findings of past discrimination, arises because the governmental unit enacting a racial preference must limit itself to remedying past discriminatory practices.

Finally, as was noted by the prior opinion in this case, the presence of an expiration date and a waiver provision may help to narrow the scope of a plan's operation. *Croson*, 779 F.2d at 191. Those features cannot, however, salvage an ordinance which otherwise transgresses *Wygant's* standards. Whether the Richmond plan will be retired or renewed in 1988 is, at this point, nothing more than speculation. Nor does the waiver here cure the constitutional defects defined by the *Wygant* decision. The waiver is to be granted "only in exceptional circumstances" and as a matter of

administrative discretion. The burden of obtaining the waiver rests at all times upon the prime contractor who must demonstrate the unavailability or the unwillingness of racially preferred enterprises to participate in the contract project. *See Croson*, Appendix B, 779 F.2d at 179-80. We doubt that any waiver, let alone the restrictive provisions of the waiver in this case, could cure the objectionable aspects of the Richmond ordinance.

Although this case presents a Fourteenth Amendment claim rather than a Title VII claim, the Supreme Court's recent pronouncement on Title VII in *Johnson, supra*, is still instructive. The Court may have adopted a different standard for evaluating challenges to plans under Title VII than under the Fourteenth Amendment, but it has insisted in both contexts that remedial efforts must ensure fair treatment [1362] of whites and blacks, males and females. The Court stressed in *Johnson* that the Agency plan permitted competition among qualified aspirants, 107 S.Ct. at 1455; the Richmond plan, by contrast, aims to stifle competition in the interest of a rigid set-aside. The plan upheld in *Johnson* made race or gender "but one of numerous factors" considered by the government agency in its employment decisions. *Id.* The race or gender of an applicant was merely a "plus"; no rigid quotas or set-asides were used. The Court characterized the program as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force." *Id.* at 1457. None of the factors emphasized by the Court in *Johnson* apply to Richmond's plan, which features the combination of an inadequate foundation for remedial action plus a "reflexive

adherence to a numerical standard" which the Supreme Court in *Johson* disavowed. *Id.* at 1455.

IV.

The *Wygant* requirements amounted to more than a trivial hurdle for localities that wish to draw racial distinctions. They are the heart of the Supreme Court's approach to the constitutionality of remedial preferences. Nothing in *Wygant* outlaws all such preferences, and subsequent cases have clarified their reach. *Wygant* does, however, limit racial preferences to what is necessary to redress a practice of past wrongdoing. The Richmond ordinance reflects the most casual deployment of race in the dispensation of public benefits. It prefers some, and in so doing diminishes the rights of all. *Wygant* rejected that approach, and with it the notion that racial distinctions among citizens will ever become the perfunctory reality of public life.

The judgment of the district court is reversed and the case is remanded for a determination of appropriate legal and equitable relief.

REVERSED AND REMANDED.

SPROUSE, Circuit Judge, dissenting:

As the majority notes, the Supreme Court remanded our previous decision for us to consider the constitutionality of the City of Richmond's affirmative action ordinance in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). In my view the majority both misconstrues and misapplies *Wygant*. In his plurality opinion, Justice

Powell stated that any classification based on race "must be justified by a compelling governmental interest," *id.* at 1846 (plurality opinion) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1881, 80 L.Ed.2d 421 (1984)), and "the means chosen . . . to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980)). Four justices in *Wygant* also expressed the view that "societal discrimination" is not a sufficient basis for demonstrating a compelling government interest.[3] I think the Richmond ordinance easily satisfies Justice Powell's two-prong test and, assuming that a majority of the Court eventually will adopt the "societal discrimination" modification, it satisfies the test even as modified.

I.

On April 11, 1983, the Richmond City Council, the legislative body of the City of Richmond, voted six to three to adopt the affirmative action ordinance at issue in this case.[4] It acted in response to information

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[3]The majority correctly states that five Justices concurred in the judgment that the remedy in *Wygant* was unconstitutional. It also properly notes, albeit somewhat implicitly, that Justice White, who provided the crucial fifth vote in the case, did not join in the opinions of either Justice Powell or Justice O'Connor. The majority's assertion, therefore, that the "*Wygant* Court[ ] reject[ed] . . . societal discrimination as a basis for remedial action," At 1359, is misplaced. Only four Justices adopted this position, Justice White did not.

[4]*See generally* Richmond, Va.Code Ch. 24.1, Art. I(F) (Part B) (27.10) (27.20) and Art. VIII-A.

presented at a public hearing held that day [1363] that, among other things, indicated that although minority groups made up fifty percent of the City's population, only two-thirds of one percent of the City's construction contracts from 1978-1983 were awarded to minority businesses. The ordinance required all contractors to whom the City awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs) unless the City waived the requirement. The ordinance was expressly remedial, "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[5] It automatically expires on June 30, 1988.

During a prolonged debate prior to enacting the ordinance, the Council reviewed the history of public procurement in Richmond.[6] The Council and witnesses had available historical records of city contracting, which showed that minorities, who constituted fifty percent of the City's population, had been awarded over a five-year period only two-thirds of one percent of the

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[5]Richmond, Va.Code Ch. 24.1, Art. VIII-A(C).

[6]At the hearing, the Council heard from: Esther Cooper; Freddie Ray, President of Task Force for Historic Preservation in Minority Communities; Stephen Watts, attorney representing Associated General Contractors of Virginia; Richard Beck, president of a local plumbing contractors' association; Mark Singer, a representative of the electrical contractors' association; Patrick Murphy, American Subcontractors Association; Al Shuman, Professional Estimators Association. During the debate between Council members, those opposed to the ordinance contended it was unfeasible because there were insufficient numbers of minority contractors, because it would inflate contract bids and because it would not be conducive to top

City's contracting business. The debate was sharp, and the issue was well defined. Unchallenged statements of council members demonstrated that the ordinance was designed to serve a remedial purpose. One councilman observed that the Council had "reviewed the history of the construction contracts" and structured the proposed ordinance in accordance with federal law (presumably the statute interpreted by the Supreme Court in *Fullilove*). Another councilman stated:

> And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.
>
> I think the situation involved in the City of Richmond is the same, and I would like to give the Clerk a copy of the listings of the contracts for the past five years awarded by the City of Richmond. Contracts totalling over 124 million dollars. And less than one percent were given—were awarded to minorities. I think the question of whether or not remedial action is required is not open to question.

(Footnote 6 Continued)

quality work. Council members favoring the ordinance emphasized the history of discrimination in the construction industry, the current difficulties encountered by MBEs in the Richmond area, and the success of similar set-aside programs in other parts of the country. *Hearing on Adoption of Minority Business Utilization Plan*, Richmond City Council, April 11, 1983.

A city councilman and the city manager further urged that the construction industry discriminated against persons on the basis of race, both in the city of Richmond and the state of Virginia. A number of contracting association representatives took part in the hearing, and none denied this claim—although several asserted that their own organizations did not discriminate on the basis of race.[7] Proponents of [1364] the ordinance asserted that this discrimination was parallel to and part of the discrimination that currently existed in the nation's construction industry.[8] Likewise, opposing witnesses and council members did not deny this assertion. As noted, after the debate ended the Council approved the "set-aside" ordinance by a vote of six to three.

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[7]One of the contractor representatives speaking in opposition to the bill cited statistics to the effect that, of the construction contractors in the United States, only 4.7% were minority contractors and 41% of that figure were located in five states. The balance were scattered among the other 45 states, including Virginia. In other words, in a 45-state area (including Virginia) only 2.8% of the contractors were minorities. The spokesman for the general contractors of Virginia testified that there were 600 contractors in the state association and 130 in Richmond. None were black. Other witnesses testified that none of the 150 Virginia plumbing, heating and cooler contractors were black; that three of the 200 electrical contractors in the state were black; that none of the 150 to 200 Virginia members of the American Subcontractors Association were black; that one of 60 members of the central Virginia contractors association was black; and that one of 45 professional estimators in the Richmond association was black.

[8]The Supreme Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n. 1, 99 S.Ct. 2721, 2725 n. 1, 61 L.Ed.2d 480 (1979), noted that: "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."

II.

A.

In the majority's view, the Council totally failed to establish prior discrimination in the awarding of public construction contracts. This is a slippery foundation upon which to build the principal part of its opinion.[9] Assuming, however, a requirement that lacked majority support in *Wygant,* I am persuaded that the Richmond Council had a firm basis for believing it had engaged in past discrimination in awarding public contracts.

Initially, it is essential that we keep our appellate task in the proper perspective. We are not reviewing findings of fact and, as the majority concedes, we do not review the Council's actions under the same criteria by which we review judicial decisions. If that were the case, our review would intrude into the local legislative process and impose undue limitations on local policymakers. Here, however, we need only be assured

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[9]It must be emphasized that *Wygant* simply does not mandate "particularized findings" of "prior discrimination *by the government unit involved,*" At 1357 and 1358 (emphasis in original), as a constitutional prerequisite to the validity of a race-conscious remedy for unlawful discrimination. The suggestion that a public entity may never implement such a remedy to redress the effects of discrimination it had not perpetrated is supported only by Justice Powell's opinion for a three-Justice plurality. Even that opinion did not make, in the words of the present majority, "particularized findings . . . [of actual discrimination] essential." *Id.* at 1357. Indeed, a majority of the Court disclaimed any such requirement, *see Wygant,* 106 S.Ct. at 1853 (O'Connor, J., concurring), and only four Justices would expressly require a public actor to document (at minimum) that it "has a firm basis for believing that remedial action is required." *See id.*

that the council members, "who are presumably fully aware both of their duty under federal law to respect the rights of *all* their [contractors] and of their potential liability for failing to do so, act[ed] on the basis of information which g[ave] them a sufficient basis for concluding that remedial action is necessary. . . ." *Wygant*, 106 S.Ct. at 1855-56 (O'Connor, J., concurring). As Chief Justice Burger has observed, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774 (plurality opinion). The Chief Justice was considering congressional power in a tripartite government context, but his observation also relates to the legislative nature of the proceedings. We should at least give similar deference to the Council's proceedings. Considering the gross disparity between the resources of the City Council of Richmond and the United States Congress, I am convinced that the Council proceeded on a firm basis for believing that its ordinance was necessary to remedy the effects of prior racial discrimination in the awarding of public construction contracts.

The Council was satisfied that the pervasive discrimination existing in the nation's craft unions and construction businesses also existed in Richmond. Minority contractors had received only two-thirds of one percent of city construction contracts between 1978 and 1983, although the minority population of Richmond during this period was approximately fifty percent. The Council was convinced that this disparity resulted from purposeful discrimination against minority contractors.

I would not disagree with the majority's observation that the Council did not make particularized findings of past discrimination.[10] [1365] No one testified, for example, that he had applied for a city contract and was denied it because he was black. However, not only is such evidence "hard to come by," but municipal legislative proceedings simply are not geared to producing it, even if it is available. Additionally, as Justice O'Connor recognized, the requirement of such a *mea culpa* finding might be fatally counter-productive to the concept of affirmative action.

A statistical showing is not a prerequisite to an affirmative action plan and is particularly inappropriate in situations of this type. There are, for example, one hundred thirty members in the general contractor association of Richmond. None are black. Information developed during the council debate revealed that blacks constitute less than one percent of construction contractors involved in all crafts. The award of two-thirds of one percent of public contracts to an approximately equivalent percentage of qualified minority contractors would hardly establish a statistical prima facie case of discrimination.

It seems inevitable, however, that a proof scheme requiring a comparison of the percentage of contracts

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[10]Under the view held by a majority of the Court in *Wygant*, such findings clearly are not necessary. *See supra* p. 1363, n. 7. In her concurring opinion, Justice O'Connor stated "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring).

awarded with this small qualified pool of minority contractors would ensure the continuation of a systemic *fait accompli*, perpetuating a qualified minority contractor pool that approximates two-thirds of one percent of the overall contractor pool.[11] It is true that in a case amenable to statistical proof, a comparison of the percentage of construction contracts awarded to minority contractors and the percentage of minorities in the general population usually would be probative of "societal discrimination." I suggest, however, that two-thirds of one percent compared to a minority population of fifty percent breaks the bounds of the sometimes suspect "science" of statistics and is probative[1] of a good deal more than general discrimination.

In my view, therefore, not only was the traditional statistical data unavailable, it was not necessary to support the Council's conclusions. The Council, for the reasons I have discussed, had a firm basis for concluding that the remedial ordinance was necessary to cure the ills of past discrimination in awarding public contracts.

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[11]To require such a proof scheme, as does the majority, creates a gross anomaly. To illustrate, assume that in some metropolitan areas, the percentage of qualified minority contractors is approximately equivalent to the percentage of minorities in their general population. An affirmative action plan might be allowed in these areas because there would be a statistical basis to show a discrepancy between the percentage of minorities awarded contracts and the percentage of qualified minority contractors. In contrast, a plan would not survive the proof scheme in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond, because there would be no discrepancy between the two points of comparison. It is anomalous that truly pernicious discrimination could have the compound effect of blocking remedial action.

B.

As I have said, this "firm basis" satisfies the compelling state interest test, even considering the "societal discrimination" limitations that might modify that requirement. Justice Powell in *Wygant* stated

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.
>
> * * *
>
> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive.

Wygant, 106 S.Ct. at 1848 (plurality opinion). Justice Powell expressed this concern against the background of the explicit approval by the circuit court in *Wygant* of [1366] the "role model" and "societal discrimination" bases for the affirmative action plan involved there. In this case, however, there was no suggestion before the Council that the Richmond business community needed a "role model" in the form of highly visible minority contractors performing public work, or even that the minimal presence of minority contractors in that endeavor was caused by such "societal" discriminatory factors as past inferior education or lack of access to social institutions.

The conclusions that emerged from the Council's debate concerned the City's previous discrete discrimination in awarding contracts for public construction projects. However, even if the lack of contracts awarded to minority contractors resulted from both societal discrimination and discrete discrimination in public construction, that fact should not preclude an affirmative action remedy for the latter. The line between "societal" discrimination and discrete discrimination may in fact sometimes be illusory.[12] For example, Justice O'Connor noted that the court of appeals in *Wygant* apparently had assumed "that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed 'societal.' " *Wygant,* 106 S.Ct. at 1854 (O'Connor, J., concurring). She emphasized that such an assumption was false. *Id.* Here, "societal discrimination" may have been a force encouraging disparate treatment in many specific areas of human endeavor. The Council, however, was entirely concerned with discrimination discretely directed at minority contractors, not with the general "societal discrimination" that only coincidentally included contractors within its negative sweep.

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[12]A good argument can be made that the converse of Justice Powell's statement is also true—discrimination that is not amorphous cannot merely be labeled "societal discrimination" and dismissed from consideration in establishing affirmative action programs. Lawyer and humanitarian that he is, I cannot believe that Justice Powell meant to dismiss concrete examples of man's inhumanity to man simply because the deprivation was not caused by an identified employer or governmental representative. What is amorphous to one unaffected may be all too painfully clear to one whose livelihood has been adversely affected or whose children cannot receive opportunities equal to their brethren. I do not

III.

I also think the majority completely misses the mark with its conclusion that the ordinance is not narrowly tailored to achieve its remedial goal.[13] There is no question, of course, that such tailoring is an essential element of an affirmative action plan. In *Fullilove*, however, Justice [1367] Powell noted that the Supreme Court "has not required remedial plans to be limited

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(Footnote 12 Continued)

understand Justice Powell's position to be that societal discrimination can never be part of an appropriate basis for imposing such a remedy. Instead, I believe he is saying that before an entity enacts an affirmative action program, it must have a strong basis for concluding the program is necessary to correct racial imbalances directly attributable to racial discrimination, whether or not it is in part societal discrimination.

In *Wygant*, for example, a number of unexplained reasons could have accounted for the disparity between the percentage of minority teachers and the percentage of minority students in the Jackson school system. A generalized belief that some amorphous, or "societal," discrimination contributed to that disparity was insufficient to justify the School Board's affirmative action program. In *Fullilove*, however, the program constituted an appropriate remedy, in light of Congress' well-documented finding that both public and private discrimination directly contributed to the small percentage of public contracts awarded minority contractors. There, Justice Powell concurred in the Court's judgment that upheld Congress' ten-percent set-aside program for minority contractors.

[13]As an alternative basis for its holding, the majority concludes that the ordinance is not narrowly tailored to the remedial goal of eliminating discrimination. It reasons that the thirty-percent minority set aside is over-inclusive and hypothesizes that in certain contracts the thirty-percent figure would have to be adjusted

to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508, 100 S.Ct. at 2790 (Powell, J., concurring). Moreover, Justice Powell identified several considerations to guide the determination of whether the plan is sufficiently narrow, *e.g.*, the duration of the plan, the availability of waiver provisions, the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, and the effect on innocent third parties. 448 U.S. at 510-11, 100 S.Ct. at 2791 (Powell, J., concurring). I am convinced that under these criteria the ordinance is sufficiently narrow.

The first two criteria need little discussion. The Richmond Plan is designed to last only five years. Its waiver provisions were purposefully drawn to parallel those approved in *Fullilove*. Even the majority concedes, as it must, that these factors help narrow the scope of the ordinance.

(Footnote 13 Continued)

upward. These conclusions of the majority lack evidentiary support; to use a phrase coined by the majority, they "emerge[ ] from the mists."

In their opinions in *Wygant*, both Justices Powell and O'Connor reaffirmed the principle that the plaintiff bears the overall burden of providing the constitutional invalidity of an affirmative action plan. *Wygant*, 106 S.Ct. at 1848 (plurality opinion); *id.* at 1856 (O'Connor, J., concurring). In the present case, the plaintiff presented no evidence to the trial court to suggest that the thirty-percent set aside was over-broad. The majority's finding of over-inclusiveness, therefore, suffers from the same lack of a "firm basis" that it erroneously imputes to the Council.

The third criterion identified by Justice Powell requires a more detailed analysis. It must be conceded that a set-aside plan limited to the current percentage of minority contractors would not eliminate the present low level of minority participation in government contracting. In remedying the effects of discrimination, a program obviously must set aside much more than two-thirds of one percent of subcontract work if it is to encourage minorities to enter the contracting industry and encourage existing minority contractors to grow.[14] *See Fullilove,* 448 U.S. at 513-14, 100 S.Ct. at 2792-93 (Powell, J., concurring) (10% set-aside acceptable, where 17% of the population and only 4% of the contractors were minority group members); *Schmidt v. Oakland Unified School Dist.,* 662 F.2d 550, 559 (9th Cir.1981), *vacated on other grounds,* 457 U.S. 594, 102 S.Ct. 2612, 73 L.Ed.2d 245 (1982) (25% goal acceptable in light of city's 34.5% non-white population; decision vacated for failure to reach merits of state statutory issue prior to deciding constitutional claim); *Southwest Washington Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County,*

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[14]The Supreme Court most recently approved a similar approach in *United States v. Paradise,* ___ U.S. ___, 107 S.Ct. 1053, 94 L.Ed.2d 203 (U.S.1987) where the evidence demonstrated that the Alabama Department of Public Safety steadfastly had resisted the promotion of black troopers. *See also Johnson v. Santa Clara County,* ___ U.S. ___, 107 S.Ct. 1442, 94 L.Ed.2d 615 (U.S.1987); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC,* ___ U.S. ___, 106 S.Ct. 3019, 3050-51, 92 L.Ed.2d 344 (1986). Although approaching the problem in a different procedural context, the decision in *Paradise* demonstrated the propriety of a temporarily imposed overrepresentation to meet a long-range goal. After considerable litigation, the district court ruled that fifty percent of all promotions from trooper to corporal must be from a labor pool consisting of black troopers, even though that pool

100 Wash.2d 109, 667 P.2d 1092, 1101 (1983) (MBE participation goal of 11% set at slightly less than county's minority population held acceptable). Common sense dictates that judging the set-aside percentage by referring to the small proportion of existing MBEs in the economy would perpetuate rather than alleviate past discrimination.

As to Justice Powell's last suggested criterion, *i.e.*, the effect on innocent third parties—the favoring of a percentage of [1368] minority contractors will, of course,

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(Footnote 14 Continued)

consisted of only twenty-five percent of the total trooper pool. Responding to the Department's argument that this exceeded a statistical balance by twice, the Court said:

> The Government suggests that the one-for-one requirement is arbitrary because it bears no relationship to the 25% minority labor pool relevant here. This argument ignores that the 50% figure is not itself the goal; rather it presents the speed at which the goal of 25% will be achieved. The interim requirement of one-for-one promotion . . . would simply have determined how quickly the Department progressed toward this ultimate goal.
>
> * * *
>
> Although the appropriate ratio here "necessarily involve[d] a degree of approximation and imprecision," *Teamsters v. United States*, 431 U.S. 324, 372 [97 S.Ct. 1843, 1873, 52 L.Ed.2d 396] (1977), the District Court, with its first-hand experience of the parties and the potential for resistance, imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of white troopers.

Paradise, ____ U.S. at ____, 107 S.Ct. at 1070 (footnote omitted).

disfavor a percentage of nonminority contractors. That is the negative side of the necessary balancing in any affirmative action program: "innocent persons may be called upon to bear some of the burden" of remedying the effects of discrimination. *Wygant*, 106 S.Ct. at 1850 (plurality opinion). Here, however, as with *hirings* in employment cases (as opposed to *layoffs*), the result is not to deprive a nonminority member of something already possessed but to limit temporarily a future opportunity. This distinction has been noted with approval in a number of Supreme Court cases. In *Wygant*, for example, Justice Powell said:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

106 S.Ct. at 1851 (plurality opinion) (emphasis in original). The ordinance is narrowly drawn; it satisfies all of the *Fullilove* criteria.

For all these reasons, I would affirm the judgment of the district court.

"EXCERPTS FROM DOT (UMTA) CIRCULAR C 1165-1 (DECEMBER 30, 1977)"

Adequate planning is critical to insuring that MBEs have an equitable opportunity to compete for contracts and subcontracts. The applicant should begin this planning by reviewing and evaluating its transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation. Once these have been identified, goals should be set which are practical and related to the availability of minority firms in desired areas of expertise. Goals provide a benchmark for achievement of the MBE program within a specified time frame.

UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances. There are several factors, however, which contribute to successful goal setting:

— Goals should be based on projections of contract awards.

— Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

— Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

- Achievement of specified MBE subcontract goals or adequate documentation and justification of failure to meet the goals must be required of prime contractors.

- Goals should be related to the availability of MBEs.

- Other local MBE goals should be taken into consideration.

The setting of goals is an attempt to match projected procurements with available, qualified MBEs. An MBE is unavailable to perform if it has the knowledge of the terms and specifications of the contract needed to formulate intelligently a proposal for such work or to decline intelligently an opportunity to formulate such a proposal and it does not intend, or is unable, to make a proposal because of lack of interest, inability to meet the reasonable and ordinary demands connected with doing such work, unwillingness to meet the specifications for such work, unwillingness to work on this project or in this geographic area, or such other reason as is determined by the applicant to be sufficient.

The geographic basis for assessing MBE availability will vary with the type of procurement. For example, availability for printers may be confined to the local metropolitan area due to logistics of timely completion of work orders. On the other hand, the availability of A&E firms might be determined on a national basis, since these firms are more mobile. In general, in defining the geographical boundaries for determining the availability of MBEs in specific trades or professions,

the applicant should follow a common sense approach and the customs that the applicant have applied to non-minority firms.

It should be kept in mind that, if the data collected to develop goals, particularly MBE availability, is inadequate or is assessed in a superficial manner, UMTA may find the goals unacceptable.

Goals should be reviewed at least annually. The review process should analyze the projected versus the actual MBE participation during the previous year. The necessary revisions should be made based on the analysis and submitted to UMTA. Goals, and a description of the methodology used in establishing them, must be submitted to UMTA with each project application.

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

H. K. PORTER CO., INC., Petitioner

v.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida, Respondent.

Appendix

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For the foregoing reasons, Silien's conviction is

AFFIRMED.

H.K. PORTER COMPANY, INC., Plaintiff-Appellant,

v.

METROPOLITAN DADE COUNTY, John Dyer, individually and as Contracting Officer for Metropolitan Dade County, Defendants-Appellees.

No. 86-5448.

United States Court of Appeals, Eleventh Circuit.

Aug. 24, 1987.

Lowest bidder brought action against county to challenge affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system. The United States District Court for the Southern District of Florida, No. 81-2766-CIV-EBD, Edward B. Davis, J., awarded summary judgment to county. Lowest bidder appealed. The Court of Appeals held that: (1) statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement, and (2) affirmative action program did not violate equal protection.

Affirmed.

1. Civil Rights ⇐9.5

Statutes, which prohibit discrimination in programs or activities receiving federal financial assistance, permitted Urban Mass Transit Administration of Department of Transportation to impose affirmative action, minority business enterprise requirement on contract for electrified third rail of metropolitan transit system. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1).

2. Constitutional Law ⇐219.1

Affirmative action program, that required 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was justified by Congress' compelling interest in eradicating continuing effects of past discrimination, was narrowly tailored to achieve stated goal of fostering minority participation, and did not violate equal protection, where program ended when construction was completed, and where bidding procedure excused bidder from contracting or subcontracting with minority business enterprises, if bidder demonstrated reasonable effort to contact and negotiate with minority businesses. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const. Amend. 14.

3. Constitutional Law ⇐219.1

County, that used affirmative action program requiring 5% participation by minority business enterprises in construction of electrified third rail of metropolitan transit system, was not required by equal protection clause to make findings in addition to Congress' legislative findings establishing that minorities did not participate in government contracts. Surface Transportation Assistance Act of 1978, § 101 et seq., 92 Stat. 2689; Civil Rights Act of 1964, § 601, as amended, 42 U.S.C.A. § 2000d; Urban Mass Transportation Act of 1964, § 19(a)(1), as amended, 49 U.S.C.A. § 1615(a)(1); U.S.C.A. Const.Amend. 14.

Guy W. Harrison, Mershon, Sawyer, Johnston, Dunwody & Cole, Charles C. Kline, Miami, Fla., for plaintiff-appellant.

Robert S. Ginsburg, Dade Co. Atty., R.A. Cuevas, Jr., Asst. Co. Atty., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The dispute in this case arises out of the award of a federal construction contract for the electrified third rail of Miami's metropolitan transit system. Appellee, Metropolitan Dade County ("MDC") awarded the contract to the second lowest bidder, Transit Products, Inc. based upon an affirmative action plan. The low bidder, H.K. Porter, Inc., appellant, alleged that the affirmative action plan was unconstitutional. The district court awarded summary judgment to MDC. Finding no error, we affirm.

The facts and procedural history are set out in detail in this court's opinion, *H.K. Porter Co., Inc. v. Metropolitan Dade County*, 650 F.2d 778, 779–81 (5th Cir. 1981).[1] For the purposes of the immediate controversy, however, we here set forth a brief synopsis of the relevant facts.

On November 6, 1978, Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub.L. No. 95–599, 92 Stat. 2689 (1978), which appropriated sums of federal money for the construction of highways and mass transportation systems. In the STAA legislative history, the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs. H.R.Rep. No. 95–1485, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.Code Cong. & Admin.News 6575, 6647. To facilitate this initiative, grantees of STAA funds were required to establish written affirmative action plans which included percentage goals for minority business participation.

In 1979 MDC proposed to construct a rapid transit system for the metropolitan Miami area. Pursuant to the STAA, the Urban Mass Transit Administration ("UMTA") of the Department of Transportation ("DOT") would finance 80% of the costs of the project. MDC would contribute the remaining 20%. On December 30, 1977, DOT issued Circular 1165.1—a statement of DOT's policy and requirements for UMTA grant recipients. The circular stated that "It is UMTA policy that MBE's [minority business enterprises][2] shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." The circular further stated that failure to follow UMTA policy could result in disqualification of grantee funds. Additionally, on March 6, 1978, DOT issued Order 4000.7A,[3]

1. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) this court adopted as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2. For the purposes of contract Y–621, a minority business enterprise was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

3. Order 4000.7A stated in pertinent part:

> a. It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department. Economically and socially disadvantaged individuals, including minorities and women, have traditionally been underrepresented as owners and managers of businesses in this country. The executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve the goal of equal opportunity. To overcome the traditional

which re-emphasized the enforcement of DOT's MBE program. Both the circular and the order encouraged all grant recipients to establish percentage goals for MBE participation.

On June 10, 1979, MDC advertised for bids [4] from prime contractors interested in the electrified third rail to be used in the construction of the transit system under contract Y-621. Pursuant to STAA's initiative, MDC's bid invitation included a minority contractor provision which required each bidder to either (a) involve MBE's in 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority contractors in an attempt to achieve the stated goal. The bid invitation also contained a provision which allowed the bidder to demonstrate that it was unable to involve minority business, notwithstanding their efforts to contact and negotiate, because minority contractors were either not qualified to do the work required of the contract or because minority contractors were unavailable. The contract's Minority Contractor Participation Provision required each bidder to list the minority contractors the bidder intended to use if awarded the contract.

MDC received three bids for contract Y-621. The two lowest bids were received from Transit Products, Inc., ("Transit") and H.K. Porter ("Porter"). The bid from

underrepresentation of these groups in the business community, the federal government has used its procurement authority and its financial assistance programs to state and local governments as vehicles to assist minority business enterprises. Executive Order 11625 directs the Department of Commerce to provide technical and financial assistance to promote MBEs. Executive Order 11625 further requires that federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise.

b. The Department of Transportation is firmly committed to fulfilling its responsibilities under this Executive Order and to meet the goal of greater MBE participation in contracts and projects funded by the Department, although this may result in some increased cost to DOT. To this end, DOT is requiring each of its operating elements and all aid recipients and their contractors to make strong affirmative action efforts designed to set and meet goals for increasing MBE involvement. These efforts will encompass all aspects of the procurement of supplies, equipment, construction and services, including professional service contracts, concession contracts and bank deposits.

c. The Department recognizes that meaningful gains in the level of MBE participation can be achieved only with energetic enforcement of this order and the commitment of all DOT employees, grantees and contractors to the goals of equal opportunity.

4. Contract Y-621's bidding requirements and procedures required each bidder, as part of its bid submission, to submit:

a completed Schedule for Participation by Minority Contractor, listing those Qualified Minority Contractors with which the Bidder intends to contract for the performance of portions of the work under the Contract, specifying the agreed price to be paid to each such Minority Contractor for such work, identifying in detail the contract items or parts thereof to be performed by each such Minority Contractor, including a proposed timetable for the performance of each such contract item and providing other information as may be required by the Schedule. No work shall be included in the Schedule which the Bidder has reason to believe the listed Minority Contractor will subcontract, at any tier, to a non-Minority Contractor;

a completed and signed Letter of Intent for each Minority Contractor listed in the Schedule;

a completed and signed Minority Contractor Identification Statement of each Minority Contractor listed in the Schedule and for the Bidder if it is a Minority Contractor, but no Minority Contractor Identification Statement is required for any Minority Contractor named in the Minority Contractor List, and in the event the work listed on the Schedule is not sufficient to fulfill the stated goal, a statement by the Bidder of the reasons why it believes it is in compliance with this Provision and a list of the names, addresses and telephone numbers of the Minority Contractors contacted by the Bidder with respect to the performance of work under the Contract. The listing of a Minority Contractor by a Bidder on its Schedule shall constitute a representation by the Bidder that such Minority Contractor is Qualified and not Unavailable, and a commitment by the Bidder that if it is awarded the Contract it will enter into a subcontract with such Minority Contractor for the portion of the work and at the price set forth in its bid submission, subject to the terms of this Provision.

The bidding procedures further stated that "MDC shall not award a [c]ontract to any [b]id-

Transit was for $8,873,502 and the bid from Porter was for $8,076,506.80. However, Porter, rather than list the minority contractors it intended to use if awarded the contract, left the six pages in contract Y-621's Minority Contractor Participation Provision blank. Porter instead attached a letter stating that no minority firms produced the required materials and that Porter would therefore "follow the same plan and outlines that we have had approved on other transit programs." The bid submitted by Transit involved 5% minority contractor participation in compliance with contract Y-621's 5% MBE goal.[5] MDC decided, after extensive proceedings [6] both at the administrative level and in federal court, to accept the bid proposed by Transit, despite the fact that Porter's bid was lower since Porter's bid did not comply with the contract's MBE provisions. Porter was given a compliance hearing on November 28, 1979. At the compliance hearing Porter was asked by MDC's Compliance Officer, Dr. James Corbin, to explain why it had not complied with contract Y-621's bidding procedure of listing the minority contractors it had contacted in order to meet the 5% MBE goal. Porter responded by stating that it had made a recent investment in an in-house assembly plant in Chicago that totally assembled all the component parts of the electrified third rail. Porter stated that due to its in-house assembly plant, only four items from outside sources were necessary to produce the electrified rail.[7] Porter stated that no minority firms produced any of these four items. Porter testified that because of the nature of its in-house plant, it was "economically impracticable" to break down contract Y-621 in an attempt to subcontract to MBE's.

On December 10, 1979, MDC's Contracting Officer, John Dyer, opined to MDC's Board of County Commissioners that Porter's bid was not in compliance with the minority participation provisions of contract Y-621. On December 10, 1981, Porter brought the immediate action against MDC, and John Dyer, as the Contracting Officer. Porter's complaint alleged that MDC's 5% MBE goal was both unconstitutional on its face and as applied in violation of 42 U.S.C. §§ 1981, 1983, 2000d (1982) and 49 U.S.C. § 1615 (1982). Porter also contended that MDC and John Dyer acted in an arbitrary and capricious manner in denying contract Y-621 to Porter. Porter also alleged $1,510,544.00 in damages as a result of not being awarded the contract.

Both MDC and Porter filed cross-motions for summary judgment before the district court. The district court held a pretrial conference, allowing both parties to present their arguments. The district court ruled that MDC's bidding procedure for contract Y-621 was not unconstitutional and that MDC, in denying the contract to Porter did not act arbitrarily or capriciously. The district court granted summary judgment in favor of MDC and against Porter. Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since we find that there is no genuine issue as to any material fact, we affirm.

DISCUSSION

This case presents three issues: (1) whether the MBE program promulgated by the UMTA and MDC was violative of 42 U.S.C. § 2000d and 49 U.S.C. § 1615 thereby making the program unconstitutional on its face; (2) whether MDC acted unconstitutionally by employing a 5% MBE partic-

der which it determines fails to comply with the applicable requirements of this [p]rovision."

5. One of the minority firms Transit originally included in its bid for contract Y-621 was questioned by Porter as not being a bona fide MBE. Transit thereafter substituted a legitimate MBE, as it was allowed to do under contract Y-621's bidding procedure.

6. *See H.K. Porter*, 650 F.2d 778 (5th Cir.1981).

7. The General Manager of Porter's in-house assembly plant in Chicago, Mr. Gerhard O. Mietz, stated that contract Y-621 required four basic components: (1) steel rail, (2) aluminum extrusions, (3) a bolt holding the steel rail and aluminum together, and (4) oxide-inhibiting paste to be applied to aluminum and steel.

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ipation provision in its bidding procedure for contract Y–621; and (3) whether MDC acted arbitrarily and capriciously in denying the award of contract Y–621 to Porter.

With respect to the facial unconstitutionality of MDC's MBE program, Porter argues that the UMTA did not have the authority to promulgate such a program because Congress has statutorily prohibited any and all UMTA-funded programs from employing affirmative action. 42 U.S.C. § 2000d (1982) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Porter argues § 2000d, therefore, cannot be used to authorize the MBE program propounded by UMTA. 49 U.S.C. § 1615(a)(1) provides:

> (a)(1) No person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or denied the benefits of, or be subject to discrimination under any project, program, or activity funded in whole or in part through financial assistance under this chapter.

Accordingly, Porter argues, any use of racial, ethnic or sexual criteria in awarding contract Y–621 is facially violative of both 42 U.S.C. § 2000d and 49 U.S.C. § 1615. Although we agree with Porter that the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes, we are constrained to follow the precedential mandates of the Supreme Court. The Supreme Court has recently stated, "[i]t is now well established that government bodies ... may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, — U.S. —, —, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987). In *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court held that Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. § 2000e et seq., left free both private unions and employers to voluntarily employ a collectively bargained plan that reserves for black employees 50% of the opening positions in an in-plant craft-training program until the percentage of black craftsmen in the plant is commensurate with the percentage of blacks in the local labor force. In *Weber*, the respondent argued that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument was based upon a literal interpretation of § 703(a) and (b) of Title VII. Those sections on their face make it unlawful to discriminate on the basis of race in the hiring and selection of apprentices for training programs. *Weber*, 443 U.S. at 201, 99 S.Ct. at 2726. In rejecting a literal interpretation of those statutes, the Court stated, "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'" *Id.*, (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)). The Court stated that the prohibition against discrimination contained in § 703(a) and (b) must be construed in light of the legislative history of the acts and the historical context in which the acts arose. *Id.*

In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Supreme Court upheld the facial constitutionality of a similar federally funded project, which included a similar MBE provision. In *Fullilove*, Congress had enacted the Public Works Employment Act of 1977, 42 U.S.C. §§ 6701–6736, which authorized $4 billion dollars for federal grants made by the Secretary of Commerce to state and local governmental entities for use in local public work projects. Section 103(f)(2) of the Act, the MBE provision, required at least 10% of any local works project to be set aside for minority business enterprises. In upholding the constitutionality of the MBE provision as a legitimate remedial congressional objective, the Court stated

that, "[t]he legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 468, 100 S.Ct. at 2767.

[1] Therefore, we here analyze the prohibitions against discrimination contained in § 2000d and 49 U.S.C. § 1615(a)(1) in light of the legislative and historical context in which the acts arose. An examination of the legislative and historical background giving rise to the promulgation of § 2000d and § 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitution antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483–84, 100 S.Ct. at 2777. Thus we conclude that in this case the UMTA had the authority, pursuant to the clear and strong Congressional mandate, to promulgate the MBE program relative to contract Y-621.

Porter also argues, however, that the MBE provisions of contract Y-621 were unconstitutional as applied. Porter's argument is grounded solely in Porter's interpretation of this court's opinion in *South Florida Chapters of Associated Contractors of America v. Metropolitan Dade Co.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984). Porter alleges that the MBE provisions of contract Y-621 were unconstitutionally applied because the authorities failed to follow the three "common concerns" enunciated in *South Florida*. *Id.*, at 851–52. Porter argues that *South Florida* provides "a clear and detailed blueprint" for evaluating all minority preference programs. We think Porter's reliance on *South Florida* is misplaced. *South Florida* involved the constitutionality of a county ordinance and resolution granting to black contractors preferential treatment in the county's bidding process. *South Florida*, 723 F.2d at 847–48. In *South Florida* the Dade County Commission, in response to the May 1980 disturbances in Liberty City, passed an ordinance which operated to waive altogether the formal contract bidding process and to grant to black contractors the exclusive right to bid on the construction projects of the county. The ordinance also contained a sub-contractor's provision requiring that fifty percent of the dollar value of any county contract be awarded to black sub-contractors. *Id.*, at 848–49. The ordinance was challenged both facially and as applied to the county construction project for the Earlington Heights Metro-rail Station.[8] *Id.* at 848.

In analyzing the constitutionality of the race-conscious legislation, this court, "[w]ithout adopting a formal 'test,'" *South Florida*, 723 F.2d at 852, articulated what it construed to be the three common concerns to the various views of the Supreme Court in *Regents of the Univ. of Califor-*

8. The Earlington Heights Metrorail Station is one of the metrorail stations located in Dade County.

sis v. Bakke,[9] 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), and *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758: "(1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination." *South Florida*, 725 F.2d at 851-52. These common concerns were set forth merely as safeguards to be used by a reviewing court in analyzing *"[l]egislation* employing benign racial preferences." *Id.*, (emphasis supplied). We therefore reject Porter's contention that *South Florida* provides federal courts with a detailed set of mandatory guidelines with which to analyze the constitutionality of any and all MBE programs.

Moreover, the Supreme Court has set forth a two-prong test to be applied in situations wherein preferential classifications are based upon racial and ethnic distinctions. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, ——, 106 S.Ct. 1842, 1846, 90 L.Ed.2d 260 (1986). In *Wygant*, the Court was called upon to decide the constitutionality of whether a school board could, consistent with the Equal Protection Clause, extend preferential employment protection to certain employees solely because of their race or ethnic origin. *Wygant*, 106 S.Ct. at 1844. The Court stated the classifications operated "against whites and in favor of certain minorities, and therefore constitutes a classification based on race." *Id.* at 1846. The Court went on to state such classifications must be justified by a compelling government interest. *Id.* Secondly, the means chosen to effectuate this interest or purpose must be narrowly tailored to the achievement of that goal. *Id.* (citing *Fullilove*, 448 U.S. at 480, 100 S.Ct. at 2775).

In addition, the Court has recently set forth factors to be considered in analyzing the appropriateness of race-conscious remedies. *Paradise*, 107 S.Ct. at 1067. These factors include, "the necessity for the relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* We will therefore analyze the constitutionality of contract Y-621's MBE provision under the test set forth in *Wygant* while also considering the factors articulated in *Paradise*.

[2] We have noted that MDC, in implementing the MBE provisions of contract Y-621, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts. *See Fullilove*, 448 U.S. at 497, 100 S.Ct. at 2784 (Powell, J., concurring). Further, the Supreme Court has recently made it clear that "[t]he government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *Paradise*, 107 S.Ct. at 1065. Congress' determination to foster greater MBE participation in government contracts was due, in part, to the fact that other potential possible remedies had proven unsuccessful. *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring).

As for the duration of the relief, there is nothing in the record to suggest that MDC's bidding procedure for contract Y-621, including the MBE provision, was anything more than a temporary remedy. It was simply an absolute condition MDC had to meet to receive federal funds through the UMTA in order to finance the construc-

9. *Regents of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) was the Supreme Court's first direct confrontation with affirmative action programs. Petitioner Bakke challenged an admission program of the University of California's Davis Medical School, whereby sixteen of one hundred spaces available for the entering class were set aside solely for minority applicants. The case produced no majority, however, five justices held the quota invalid.

tion of the metrorail system. This procedure, being temporary, was not a policy of MDC to maintain a racial or ethnic balance, but was rather intended by Congress to eliminate a manifest racial and ethnic imbalance. *See Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. Indeed, this particular program ended when the construction for contract Y-621 was completed. MDC's bidding procedure for contract Y-621 also contained a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with MBE's, but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779 (significant that an administrative scheme provides waiver mechanism under MBE program).

We next consider whether the 5% goal implemented by MDC in connection with contract Y-621 is sufficiently narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts. *See Paradise*, 107 S.Ct. at 1064-74; *Wygant*, 106 S.Ct. at 1846. In *Wygant*, the Supreme Court decided a case involving constitutional implications analogous to the constitutional questions presented in this case. *Id.* at 1844. As we noted earlier in *Wygant*, the Court was called upon to decide whether a school board could, consistent with the equal protection clause, extend preferential employment protection against layoffs to its employees solely because of their race or national origin. *Wygant*, 106 S.Ct. at 1844. In *Wygant*, community racial tensions prompted the Jackson Board of Education to include a layoff provision in the collective bargaining agreement between the Board of Education and the Jackson Education Association that operated to lay off tenured non-minority teachers while allowing minority teachers on probationary status to be retained. *Id.*, 106 S.Ct. at 1844-45. When layoffs became necessary the Board retained the tenured non-minority teachers, thus refusing to follow the layoff provision of the collective bargaining agreement. *Id.*, 106 S.Ct. at 1845. The Jackson Education Association, along with two minority teachers who had been discharged, alleged the Board's failure to adhere to the layoff provision violated the equal protection clause of the fourteenth amendment and Title VII of the Civil Rights Act of 1964. *Id.* On cross motions for summary judgment, the district court, *inter alia*, dismissed the claims holding "that the racial preferences granted by the Board need not be grounded on a finding of prior discrimination." *Id.*, at 1846. The Court of Appeals for the Sixth Circuit affirmed. *Id.* The Supreme Court reversed holding that the layoff plan was not sufficiently narrowly tailored, *inter alia*, because the plan was not supported by finding of past discrimination. *Id.*, at 1846-52. The court pointed out that "some showing of prior discrimination by the governmental unit involved" must be demonstrated before allowing even a limited use of racial and ethnic classifications in order to remedy prior discrimination. *Id.* at 1847.

[3] Porter argues that since Congress delegated to MDC the actual implementation of contract Y-621's MBE provision, MDC was required to make detailed and specific findings concerning past discrimination. We disagree. As indicated, MDC in implementing the MBE provisions of contract Y-621, was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts. *See Fullilove*, 448 U.S. at 478, 100 S.Ct. at 2774. Indeed, Congress' findings led the STAA to require that minority percentage goals be established as an absolute condition precedent to the receipt of federal funds. We hold that under the circumstances of this case, MDC was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract. Congress was concerned about a national problem. Its findings provide adequate support for such local projects.

Porter argues, nevertheless, that the 5% MBE goal in contract Y-621 is not narrowly tailored and thus unconstitutional as ap-

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plied because the goal was not based upon a study or investigation of the availability of qualified MBE's to participate in contract Y-621. The record does not suggest that MDC conducted such detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in contract Y-621.[10] We must concede that we are troubled by MDC's decision to use the 5% figure without supporting or substantiating the figure with some sort of consideration of the 5% goal to the relevant labor market of MBE's available to participate in contract Y-621. *See Paradise*, 107 S.Ct. at 1071. We share the Supreme Court's concern with racial and ethnic factors when used as a basis for affirmative action programs. *See Wygant*, 106 S.Ct. at 1847. ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 106 S.Ct. at 1846 (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781). Opinion of Burger, C.J.). However, federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case. As noted, the Supreme Court in *Fullilove*, approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable means of redressing the present effects of past discrimination. *Fullilove*, 448 U.S. 448, 100 S.Ct. 2758. In *Weber*, the Court held Title VII did not prohibit an affirmative action plan collectively bargained between the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation which reserved for black employees 50% of the opening positions in a sought after training program. *Weber*, 443 U.S. at 208-09, 99 S.Ct. at 2729-30. The Court in *Paradise*, 107 S.Ct. at 1067-74, upheld a one-black-for-one-white race conscious promotional requirement within the Alabama Department of Public Safety imposed by the district court as being sufficiently narrowly tailored to remedy past discrimination. It is also significant that MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors, and thus does not impose an unacceptable burden on innocent third parties. *See Paradise*, 107 S.Ct. at 1073; *Weber*, 443 U.S. at 208, 99 S.Ct. at 2729. All that was required by Porter was that Porter demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available. Further, the record reflects that MDC's decision to deny the award of contract Y-621 to Porter was not based solely on Porter's failure to meet the 5% MBE goal. The decision was also based on Porter's failure to make any effort to attempt to locate and contract or sub-contract with MBE's. The district court, in granting summary judgment against Porter, noted that Porter did not contact a single MBE, other than its already existing suppliers. We agree with MDC and the district court's conclusion that Porter has not demonstrated that it made every reasonable effort to attempt to locate and contract or sub-contract with MBE's. The district court concluded that the MBE provision of contract Y-621 was not unconstitutional. After our own examination of the record, taking into consideration the particular facts of this case and the relevant case law, we hold that MDC's use of a 5% MBE goal in contract Y-621 is not unconstitutional.

Porter's last argument is that MDC acted arbitrarily and capriciously in denying the award of the contract to Porter. Having held that MDC's bidding procedure for contract Y-621 is constitutional, this argument is without merit.

AFFIRMED.

10. MDC in fact proffered studies allegedly supporting the determination of a 5% MBE goal for contract Y-621 at the district court, however, the district court did not allow the proffered studies into evidence. MDC has not cross-appealed this ruling. Thus, no such studies appear in the record for our consideration.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-2766-CIV-EBD

H.K. PORTER CO., INC,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, FLORIDA, and JOHN A. DYER, individually and as contracting officer for Metropolitan Dade County, Florida,

Defendants.

_____/

OPINION OF THE COURT GRANTING DEFENDANTS' MOTION FOR FINAL SUMMARY JUDGMENT

FILED by MB D.C.
MAY 9 1986
ROBERT M. MARCH
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THIS MATTER is before the Court on the parties' cross-motions for summary judgment. At a pretrial conference, the Court heard argument from counsel on the issues to be tried and made various evidentiary rulings. The parties stated that the case could be decided without a trial upon the pleadings, if the record in H.K. Porter Co., Inc. v. Metropolitan Dade County, Case No. 79-4875-CIV-KING, were incorporated in the record in this case and the parties were allowed to supplement the record. The Court agreed to incorporate the record in Judge King's case into this case and allowed the parties to supplement the record. The Court agreed that the case could be taken under advisement on the parties' cross-motions for summary judgment on the issue of liability, although genuine issues of material fact remained as to the amount of damages. Rule 56(c) of the Federal Rules of Civil Procedure states: "A summary judgment, interlocutory in

character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

For the reasons expressed in this opinion, the Court concludes that the Defendants are not liable for damages to the Plaintiff, Therefore, Defendants' motion for summary judgment is GRANTED, and Plaintiff's motion for summary judgment is DENIED. Defendant is awarded taxable costs of this litigation in accordance with 28 U.S.C. §1920 and Fed.R.Civ.P. 54(d), to be taxed by the Clerk of this Court. Each party shall bear its own attorney's fees pursuant to 42 U.S.C. §1988. The Clerk is directed to close this case.

I. PLAINTIFF'S CLAIM

Plaintiff contractor, H.K. PORTER CO., INC., alleges that the inclusion of a 5% minority business enterprise goal in a contract for Defendant DADE COUNTY's Metrorail System amounts to reverse racial discrimination against white-owned contractors in violation of civil rights laws and the Constitution, actionable under 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §2000d, and 49 U.S.C. §1615 and within this Court's federal question jurisdiction, 28 U.S.C. §1331 and its jurisdiction under 28 U.S.C. §1343. Defendants' minority business enterprise goal is allegedly unconstitutional on its face and unconstitutional as applied to Plaintiff, H.K. PORTER. Further, Plaintiff contends that Defendant, JOHN A. DYER, contracting officer with Metropolitan Dade County, in refusing to waive the 5% minority business enterprise goal to award H.K. PORTER the Metrorail contract in question, acted in an arbitrary and capricious manner

in violation of Florida administrative law, actionable as a pendent claim within this Court's diversity of citizenship jurisdiction pursuant to 28 U.S.C. §1332. Defendants deny violating either the federal civil rights laws or Florida administrative law by their decision not to award Plaintiff the Metrorail contract.

Plaintiff seeks damages in the amount of $1,510,544.00, plus interest on the damages from 1979, in addition to costs and attorney's fees.

II. PROCEDURAL HISTORY

This protracted litigation over a contract for the electrified third rail in DADE COUNTY's Metrorail rapid transit system began in District Court for the Southern District of Florida in October, 1979. The first lawsuit was styled H.K. Porter Co., Inc. v. Metropolitan Dade County, Case No. 79-4875-CIV-KING. A December 28, 1979 ruling by Judge James W. Kehoe in that case was appealed to the former Fifth Circuit, which vacated Judge Kehoe's order on procedural grounds and remanded the case with instructions to dismiss the complaint for injunctive relief without prejudice. H.K. Porter Co., Inc. v. Metropolitan Dade County, 650 F.2d 778, 783 (5th Cir. Unit B 1981)(Johnson,J.). The Court of Appeals held that Judge Kehoe, in granting Defendant DADE COUNTY's motion to dissolve a temporary restraining order, improperly ruled against the Plaintiff on the merits of its constitutional claim instead of restricting its review to the temporary restraining order issues before it. Id. In accordance with the mandate of the former

Fifth Circuit, Judge King dismissed the complaint, which had solely sought injunctive relief, in Case No. 79-4875-CIV-KING on September 20, 1981. On December 10, 1981, Plaintiff, H.K. PORTER filed a new complaint regarding the same matters involved in the first lawsuit, but seeking money damages and adding JOHN A. DYER as a Defendant. In accordance with the ruling of the Court of Appeals, this Court has accorded no precedential effect to Judge Kehoe's order ruling against Plaintiff on the merits. See Id. ("the district court's order will be without precedential effect"). The Court has reviewed the file in the first lawsuit, received voluminous additional evidence, reviewed numerous memoranda submitted to the Court, and heard argument of counsel on the merits of Plaintiff's claim.

III. FACTS

The facts are well-presented in Judge Johnson's opinion for the former Fifth Circuit, H.K. Porter Co., Inc. v. Metropolitan Dade County, 650 F.2d 778, 779-781 (5th Cir. Unit B 1981).

"On June 10, 1979, appellee Metropolitan Dade County (MDC) advertised for bids on an electrified third rail of a proposed rapid transit system for the Miami metropolitan area scheduled for completion in 1984. The construction costs for the electrified rail entitled Contract Y-621 were estimated at $9.1 million; the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) was to finance 80% of these costs through a federal grant and MDC would contribute 20% of the costs. On August 8, 1979, three bids on Contract Y-621 were

received and Porter Co.'s $8,076,506.30 bid was the lowest; Transit Products, Inc., (Transit), which is not a party to this action, made the second lowest bid at $8,373,502.00.

"MDC's bid invitation included a Minority Contractor Participation provision (Addendum 3) which required each bidder to either (a) involve minority business enterprises (MBD's) at 5% of the contract work or (b) demonstrate that it has made every reasonable effort to contract and negotiate with minority business enterprises in an attempt to subcontract work to achieve the 5% goal.[1] Porter Co.'s bid included the Addendum 3 forms but the forms were blank; Transit's bid included two minority contractors (businesses owned or controlled by women) for $580,000 of the contract work. Transit protested Porter's bid for failing to comply with Addendum 3. MDC decided to reject all of the bids on Contract Y-621 but it failed to follow its own procedures in doing so.

"On October 17, 1979, Porter Co. filed this diversity action against MDC alleging its failure to offer Porter Co. the requisite administrative review to determine whether Porter Co.'s bid was in compliance with the MBE provision. The district court (Judge King) granted Porter Co. an ex parte TRO on October 18, 1979, to maintain the status quo until the court could entertain Porter Co.'s preliminary injunction motion.[2] The TRO was extended twice and was to expire on November 3, 1979; on November 2, 1979, the district court granted Porter Co.'s summary judgment motion and ordered MDC to reinstate all of the bids and to hold a hearing before a Contracting Officer as required by MDC's

regulations in order to evaluate the responsiveness of Porter Co.'s bid. During the interim, Porter Co. had amended its complaint to allege that MDC's rejection of all the bids was arbitrary and capricious and to request a mandatory injunction requiring MDC to award the contract to Porter Co.

"The compliance hearing was held on November 28, 1979, before Contracting Officer John Dyer; after hearing Porter Co.'s evidence, Dyer determined that Porter Co. had not complied with MBE's provision and indicated that he would recommend that Transit be awarded the contract.[3] UMTA concurred with Dyer's decision which assured the 80% federal participation. After learning that Dyer planned to make his recommendation to MDC on December 18, 1979, Porter Co. sought and received, on December 18, an emergency ex parte TRO which enjoined MDC from awarding the contract to another bidder for ten days. Porter Co. also moved for an order to show cause why MDC should not be held in contempt of the district court's summary judgment order. MDC responded by moving for an emergency hearing to dissolve the TRO because the delay in awarding Contract Y-621 was causing a significant increase in the contract's overall price.

"The district court (Judge Kehoe)[4] held a hearing on these motions on December 18 and 19 at which both parties were able to argue and present evidence. Porter Co. amended its show cause motion on December 20, 1979, to allege for the first time that the MBE requirements exceeded the government's statutory authority and violated the equal protection clause of the Constitution and Title VI of the Civil Rights Act of 1964.

Additionally, Porter Co. moved on December 21 for leave to file a supplemental complaint which sought to join the United States Secretary of Transportation as a party and included the allegations of the unconstitutionality of MDC's actions. On December 27, 1979, Porter Co. filed a second preliminary injunction motion to preserve the status quo once the TRO expired on December 28; alternatively, Porter Co. moved to extend the TRO to prevent MDC from awarding the contract to Transit.

"On December 28, 1979, the district court granted MDC's motion to dissolve the TRO and denied Porter Co.'s show cause motion and motion for leave to file a supplemental complaint. In its memorandum opinion, the district court (Judge Kehoe) indicated that it was determining the merits of the pending motions of both parties. Consequently, the district court reached the merits of Porter Co.'s allegations that the MBE goal was unconstitutional; the court found that the 5% goal was constitutional and that the goal as applied to Porter Co. did not exceed the bounds of fundamental fairness. Moreover, in denying Porter Co.'s motion to show cause why MDC was not in contempt, the district court reviewed the hearing held before Contracting Officer Dyer and found that the hearing complied with Judge King's order granting summary judgment for Porter Co. The district court denied Porter Co.'s motion to add the Secretary of Transportation as a party defendant without discussion. Porter Co.'s second preliminary injunction motion was not mentioned in the December 28, 1979 order but Porter Co. has not alleged any

error with respect to the district court's treatment of that motion.

"Porter Co. filed a notice of appeal from the district court's final judgment and memorandum order on December 28, 1979. The district court had indicated during the hearing held on December 28 that it would stay its order for ten days to allow Porter Co. to apply to this Court for an injunction pending appeal. On Janury 4, 1980, the Fifth Circuit granted Porter Co. an additional five-day stay of the district court's order to allow consideration of Porter Co.'s Emergency Motion for Injunction Pending Appeal; however, the five-day stay was subsequently vacated on Janury 9, 1980, when this Court denied Porter Co.'s emergency motion. Shortly thereafter MDC awarded Contract Y-621 to Transit."

At the hearing before this Court on the parties' cross-motions for summary judgment, the Court indicated that both sides felt that there was no real factual dispute on the issue of liability, although, of course, the parties disagreed on the legal significance of the uncontested facts See Transcript of Hearing, November 7, 1984 at 5 and 12. (Docket # 88) Counsel for the litigants agreed that the factual record was undisputed; however, Defendants' counsel sought to raise two additional matters to add to the evidence.

First, DADE COUNTY sought to withdraw two admissions it had made during discovery. The facts admitted were: "Prior to August 22, 1979, no representative or official of the County or of the United States Department of Transportation made an

investigation to deterine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with Contract Y-621." (Paragraph 60 of H.K.PORTER"s First Request for Admissions); "The 5% participation requirement of Y-621 was not based upon a previous investigation or calculation made by MDC or UMTA." The Court refused to allow DADE COUNTY to withdraw the admissions made in 1982, agreeing with H.K. PORTER that the facts had been admitted and that there was no evidence to contradict the admissions.

Second, the County sought to introduce evidence regarding its enforcement of the minority business enterprise requirement in Contract Y-621 on the second lowest bidder, Transit Products, Inc. See Defendant's Composite Exhibit 3. See also Footnote 7 infra. Although it was undisputed that the County monitored the second-lowest bidder and substituted the original minority subcontractor, Intransco, with a genuine minority business enterprise, Tepcon, Inc., the Court felt that additional evidence and testimony regarding Tepcon, Inc., would not be relevant to the issue of liability in this case as DADE COUNTY's actions were taken after the award of the contract. The good faith actions of the County in taking corrective actions in monitoring the second lowest bidder, Transit Products, Inc.'s, minority subcontractor after the award of the contract to Transit Products, Inc., is not an issue in these proceedings. Accordingly, the Court took no further evidence on matters occurring after the award of the contract but limited itself to the events of 1979, the same matters which Judge King and Judge

Kehoe had considered in the first case, H.K. Porter v. Dade County, Case No. 79-4875-CIV-KING. Upon the motion of DADE COUNTY, the Court admitted the entire record in the first case into evidence in this case.

As an overview, the Court notes that not only have the facts remained the same as in the first case, the positions of the parties have remained remarkably consistent since 1979. H.K. PORTER has insisted that the 5% minority business enterprise provison in Contract Y-621 is unfair, unreasonable and not feasible because there were no minority subcontractors who could do the Metrorail work. Articulate in-house and local counsel have explained H.K.PORTER's reasons at every step of the proceedings. The federal agency, the Urban Mass Transportation Administration, Dade County's Contracting Officer, Dr. John Dyer, the Dade County Commission, which voted to award the contract to Transit Products, Inc., and Federal Judge James W. Kehoe, have all disagreed with H.K. PORTER's position.

It is undisputed that the sole reason H.K. PORTER failed to get the Metrorail contract was the 5% minority business provision with which UMTA, Dade County, and Judge Kehoe felt H.K. PORTER had failed to comply. DADE COUNTY has not argued that PORTER lacked the technical ability or finances to perform the contract. DADE COUNTY has stuck to its 5% minority business goal for contract Y-621, arguing that it was willing to pay more for a contractor who could meet the goal and arguing that minority business participation was part of what DADE COUNTY bargained for and paid for in Contract Y-621. The County's position has

remained consistent throughout these proceedings--the 5% goal was feasible and H.K. PORTER failed to comply with the contractual requirement without justification.

To summarize the events of 1979 which lead to this lawsuit, on June 12, 1979, DADE COUNTY, through its agent Kaiser Transit Group, sent advance notice and a contract specifications book to approximately 90 potential bidders for Contract Y-621 (Plaintiff's Composite Exhibit 1/Defendant's Composite Exhibit 1). The Contract Specifications Book, approximately 100 pages in length, sent to the bidders prominently contained notice that minority business participation would be required from any successful bidder. See Plaintiff's Exhibit 1, "Contract Specifications Book", at page IFB 6, G.P 27-28, Appendix B Section III, p. 1-5). On July 17, 1979, the minority business participation goal for Contract Y-621 was set at 15% (Defendant's Exhbit 1, Memorandum from James D. Corbin, Director of Equal Opportunity Division to William A. Skeen, Jr., Contracts Manager). On August 7, 1979, Addendum III was issued and sent to the bidders which set the minority percentage goal for Contract Y-621 at 5% of the price. (Plaintiff's Exhibit 1, Bid Form for bid to be opened August 22, 1979 and Defendant's Exhibit 1, Memorandum, Stan Burkot of Kaiser Transit Group to file dated August 13, 1979).

DADE COUNTY's engineer estimated the cost of Contract Y-621 at $9,207,800.00. When the bids were opened on August 22, 1979, the County received two excellent bids far below the engineer's cost estimate -- H.K. PORTER's bid at $8,076,506.30

(Plaintiff's Exhibit 2, H.K. PORTER's bid form) and Transit Products, Inc. bid at $8,373,502.00 (Plaintiff's Exhibit 3, Transit Products' bid form). The bids were below estimate and within 3-4% of one another. Insul 8 Corporation, the third bidder, bid $11,063,591.00 for Contract Y-621. Insul 8 was the only other bid received by the County for the contract. The County decided, after extensive proceedings before the compliance monitor and in federal court, to take Transit Products' bid because it contained minority business participation, while H.K. PORTER's bid did not contain minority business participation. Compare Plaintiff's Exhibit 2 at Appendix B, pp. 11-17 with Plaintiff's Exhibit 3 at Appendix B, pp. 11-17).

To summarize the position of the parties, H.K. PORTER has never retreated from its view as expressed in the letter attached to the August 22, 1979 bid for Contract Y-621 written by R.E. Lillard, Manager of Transit Programs for H.K. PORTER that no minority subcontractor could do the work required on the Metrorail third-rail contract. (H.K. PORTER left the six pages in Appendix B, "Minority Contractor Participation Provision" on the Bid Form blank, including Mr. Lillard's letter instead). The letter, in its entirety, reads:

> We, the H.K. Porter Company, Inc., as a Corporation do and will adhere to every government requirement as to all EEO regulations and further, we shall attempt to involve as many minority contractors and suppliers as practicable on this program.
>
> Due to the nature of the products as specified in this transit program with regards to the raw products that are required, i.e., steel rail, aluminum extrusions, lockbolts, etc., and the

nonexistance of any minority firms in the production of these materials we shall follow the same plan and outlines that we have had approval on other transit programs.

We will appreciate any recommendations that you may have to offer with regards to this program.

R.E. Lillard
Manager, Transit Programs
H.K. PORTER CO., INC.

Plaintiff's Exhibit 2, at Appendix "B" inserted between pages 11 and 12.

Defendant, DADE COUNTY, has consistently characterized the letter as a "vague policy statement" and not in compliance with the contract's 5% minority participation goal. See, e.g., Plaintiff's Exhibit 4, Compliance Hearing before Dr. James Corbin, August 29, 1979 at p. 40.

The key factual determination for this Court to make is whether H.K. PORTER has proved that it falls within the "escape provision" of the Metrorail contract contained in Addendum No. 2 to the Contract, "Minority Contractors Provision, III, C: "Determination of Compliance", at pp. 4-5. Addendum No. 3 (Plaintiff's Composite Exhibit 1). Although H.K. PORTER claims it was surprised and prejudiced when Addendum III, which included the 5% minority goal, was sent by DADE COUNTY on August 7, 1979, the Court finds that argument first, not credible, and second, not relevant.

Despite H.K. PORTER's complaint about receiving Addendum III, which allegedly contained "new MBE requirements" only "seven working days" before the deadline for submitting bids

on Contract Y-621, the Court finds PORTER must have been aware that federal mass transit projects were going to contain minority business requirements. The Urban Mass Transportation Administration issued Circular 1165.1, entitled "UMTA MBE Policy and Requirements" on December 30, 1977. (Plaintiff's Exhibit 8). As PORTER has noted, H.K. PORTER was one of the few firms in the new mass transit commuter rail industry in the United States. See, e.g. Plaintiff's Exhibit 9, Public Hearing, Testimony of Mr. Lillard, at 101-134. Certainly, it must have carefully followed the actions of the UMTA, which provided the bulk of the funds for the projects H.K. PORTER had in Washington, Atlanta, San Francisco, Boston, and Chicago, as well as in Miami. The 1977 Circular stated: "It is UMTA policy that MBE's shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds." Plaintiff's Exhibit 8, UMTA Circular 1165.1 at 2. Under the section entitled "basis for approval", the Circular said that the required MBE programs for federally-funded mass transit programs "shall include, at a minimum . . . ercentage goals for the dollar value of work to be awarded MBEs." Plaintiff's Exhibit 8 at 4, Number 5(a)(3). H.K. PORTER could reasonably have been surprised at the 5% goal in Contract Y-621 only in the sense that that 5% goal was not higher. PORTER should have known that a specific goal for minority participation, rather than the unspecified general "best efforts" requirement for MBE involvement, would be required for Contract Y-621 in light of the Urban Mass Transit Administration's 1977 policy statement.

DADE COUNTY's incentive for setting a percentage of the value of the work to be awarded to MBEs in Contract Y-621 is clear and also contained in Circular 1165.1 -- "Failure to carry out the approved minority business enterprise action program shall be a breach of this Contract and may result in the termination of this grant, and preclude the Public Body from receiving further financial assistance under the Urban Mass Transportation Act or such other remedy as the Government deems appropriate". Plaintiff's Exhibit 8, at pp. 6-7.

Second, H.K. PORTER's argument about the timing of its receipt of Addendum III is not relevant because PORTER's position has consistently been that no minority subcontractors existed. Therefore, no amount of additional time would have assisted H.K. PROTER under its view of the facts. Finally, H.K. PORTER did not request an extension of the bid deadline, unlike Transit Products.

Therefore, H.K. PORTER's case on its compliance with the contract, leaving aside the legality of UMTA and DADE COUNTY's 5% goal, rests on whether H.K. PORTER fell within the "escape provision" of the contract. If H.K. PORTER met the requirements for the escape provision, DADE COUNTY would be in violation of the law and its own rules for awarding the Metrorail contract to the second-lowest bidder, Transit Products. Even though the bids were extremely close, DADE COUNTY is required to award public contracts to the lowest qualified bidder.

The "escape provision" is contained in Addendum III, Appendix B "Minority Participation Provision", Part III "Bidding

Requirements and Procedures Prior to Contract Award", ¶ C "Determination of Compliance". (Plaintiff's Exhibit 1, Addendum No.3, pp. 4-5) It reads, in its entirety, as follows:

> C. Determination of Compliance - the total price for work to be performed by Minority Contractors as indicated in each Bidder's Schedule for Participation by Minority Contractors is required to be sufficient to fulfill the stated goal, unless the Bidder shall demonstrate to the satisfaction of MDC that:
>
> 1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
>
> 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contracors were not Qualified or were Unavailable; and
>
> 3. it included in its Schedule such proposed agreements as could be made with such efforts.
>
> MDC shall not award a Contract to any Bidder which it determines fails to comply with the applicable requirements of this Provision. Nothing herein shall relieve any Bidder or any Contractor performing any work under the Contract from any of the terms, conditions or requirements of the Contract or modify MDC's rights as reserved in the Contract Documents.

It is undisputed that H.K. PORTER did not include any proposed agreements in its bid form--the pages were left blank. See Plaintiff's Exhibit 2. It is undisputed that H.K. PORTER did not contact any minority contractors in an attempt to subcontract work for Contract Y-621. E.g., Plaintiff's Exhibit 9 at 54. Therefore, provisions ¶¶ C(1) and C(3) are not applicable to this

determination of liability for the Metrorail contract at issue in this case. The key provision is ¶ C(2) and H.K. PORTER's contention that it was unable to achieve the stated 5% goal because minority contractors were not qualified or were unavailable.

H.K. PORTER has consistently maintained that the contact rail contract for Metrorail had to be done in-house at H.K. PORTER's special facility in Chicago, with the only subcontracting-out possibility being the provision of raw materials, for which no minority sub-contractros existed. As Lawrence E. Moncrief, H.K. PORTER's Assistant Counsel stated at the very first of many hearings in this case, the Compliance Hearing before Mr. James Corbin on August 29, 1979:

> Again, because of the nature of the process of making these rails, we feel that the only sub-out possibilitty would be the supply materials because it is a fairly sophisticated process to make this kind of rail. The only thing we feel we could sub-out would be the supply material and it is our opinion that no minority is out there who could do the job. There are no minorities who can supply aluminium extrusions. No minority contractor that extrudes aluminium to the shape we need. We have to buy it from a proprietary, the item, from those who make it. That is about it.

Plaintiff's Exhibit 4, "Compliance Hearing for Contract Y-621 H.K. Porter Company, Inc.", at 45-46.

Mr. Gerhard O. Mietz, General Manager of H.K. PORTER's Chicago Works, where the Metrorail contract was to be performed, stated that Contract Y-621 called for four basic components: (1) steel rail, (2) two aluminium extrusions, (3) a bolt holding the

steel rail and aluminium together, and (4) oxide-inhibiting paste applied to the interface of aluminium and steel. Plaintiff's Exhbit 9, "Minority Business Enterprise Public Hearing, Re: H.K. Porter Company, Inc." November 28, 1979 at 11.

Mr. Richard E. Lillard, Manager of H.K.Porter's Transit Programs, Electrical Division, testified that he was experienced in various contact rail contracts in connection with the bidding process, procurement of supplies, and work decisions. Plaintiff's Exhibit 9, November 28, 1979 Hearing at p. 21. Mr. Lillard testified that no minority firms produced the four major components nor the minor components needed for H.K. PORTER's in-house assembly of the rail. Plaintiff's Exhibit 9 at 33-51.

At the Public Hearing, the following exchange took place between Dr. John Dyer, Contracting Officer and Mr. Donald K. Moe, Vice-President, General Manager, Electrical Division, H.K. PORTER COMPANY, INC.:

> Dr. Dyer: Prior to submitting your bid on Contract Y-621, did Porter affirmatively consider the possibilitty of contracting any or all of that remaining work to minorities or any other subcontractors, for that matter?
>
> Mr. Moe: Yes, we do and did.
>
> Dr. Dyer: What was your decision?
>
> Mr. Moe: It was negative, and I would like to tell you why that decision was negative.
>
> Dr. Dyer: Then why don't we let you go ahead and do that.

Mr. Moe: Dr. Dyer, in addition to the facilities that have been discussed and related to the appurtenances and so forth, the Porter Company has made a million dollar commitment to the future of the third-rail electrification, and, this is an important part of the cost for the product you and other people in this business of putting new systems in require by both your specifications and actual application need.

I have a layout diagram of a 17,000 square foot addition completed in February of 1979 to our H.K Porter facility at roughly 2500 West Fulton Street, in Chicago, Illinois, and I would like to use nine photographs in walking my way through the facility to explain the process and the processes and the facility's value to the products involved in the production process.

(Mr. Moe proceeded with photographic slides showing the new facility in Chicago). Plaintiff's Exhibit 9 at 54-55.

H.K. PORTER was able to comply with MBE requirements in Baltimore from its plant in Lynchburg, Virginia by hiring minority-owned trucking firms. For the Miami Metrorail project, Mr. Moe stated it was not commercially feasible to send the product to Miami from H.K. PORTER's plant in Chicago via truck; the transportation had to be done by rail. Plaintiff's Exhibit 9 at 63.

Plaintiff's counsel has persuasively and vigorously argued that, on the basis of the facts discussed above, H.K.

PORTER was not able to find qualified minority subcontractors because of its in-house assembly in Chicago. See Plaintiff's Exhibit 9 at 82-90 (Closing argument of Mr. Charles Kline before Dr. Dyer); Plaintiff's Exhibit 15 Hearing before Judge Kehoe December 19, 1979 at 27 (Argument by Mr. Kline that H.K. PORTER made a calculated risk and decided it would be cheaper to fabricate the entire product in-house except for a handful of raw materials); Plaintiff's Exhibit 16 Hearing before Judge Kehoe December 20, 1979 at 29 (Mr. Kline's argument that PORTER's high fixed-cost for the Chicago plant placed it at a disadvantage for subcontracting compared to a firm without a plant and overhead). Transcript of Hearing November 7, 1984 (Docket # 88) at 47-51 (Mr. Kline's argument that commercially impossible for PORTER to subcontract fabricator process and no qualified minorities available for transport or raw materials). Cf. Plaintiff's Exhibit 10 (high percentage of minorities in Plaintiff's Chicago plant).

IV. H.K. PORTER NOT IN COMPLIANCE WITH CONTRACT'S ESCAPE MECHANISM

On the mixed question of law and fact regarding H.K. PORTER's compliance with ¶ C(2) of the escape provision,[5] the Court concludes that PORTER made a calculated risk investing in its in-house facility which made it difficult for PORTER to sub-contract out part of the work for Contract Y-621. However, the Court does not find that PORTER's in-house facility made PORTER unable to achieve the state 5% goal because "minority contractors were not qualified or were unavailable." Rather, PORTER's business decisions made it commercially unfeasible for

PORTER to subcontract. Even accepting PORTER's contention that it could not subcontract even 5% to minorities, the Court does not believe DADE COUNTY was compelled to find PORTER in compliance simply becaue of PORTER's internal business structure. It is not this Court's function to rewrite Contract Y-621 and strike the MBE provision or to excuse PORTER from its effect because of PORTER's excellent record of minority employment at its plants and that the particular plant in Chicago employed 33 workers, all of whom were minorities. There is no general constitutionally-compelled property right to government contracts which would have required DADE COUNTY to accommodate the internal business structure of one of the bidders for a contract. Cf. Economic Development Corporation of Dade County v. Stierheim, ___ F.2d ___ (11th Cir. 1986) (decided February 20, 1986) (Contractor's contract with county to distribute federal funds not property interest within the meaning of XIV Amendment). This Court agrees with the determination that H.K. PORTER was not in compliance with the Minority Business Enterprise requirement made by six previous levels of review - the Compliance Monitor, the Contracting Officer, the Urban Mass Transportation Adminsitration's Atlanta regional office and UMTA's Washington office, the Dade County Commission, and United States District Judge Kehoe. See, e.g., Defendant's Exhibit 2 (letters from Mr. Williams and Mr. Richardson); Memorandum Order of Judge Kehoe (December 28, 1979).

Therefore, DADE COUNTY had the right to choose the $8.3 million bidder, Transit Products, Inc., over the $8.1 million

bidder H.K. PORTER. Transit Products designated in advance, as required, minority business enterprise subcontractors in its initial bid, unlike H.K. PORTER. See Plaintiff's Exhibit # 3 (Transit Products, Inc., bid form, at Appendix B, pp. 11-17). DADE COUNTY made it clear that MBEs listed on the bid form were only "proposed" or "initial" minority firms until investigated. See Plaintiff's Exhibit 5 at 8 (Compliance Hearing September 5, 1979 before Dr. Corbin). Dr. Corbin expressed considerable skepticism about the genuineness of Intransco as a minority enterprise at the compliance hearing on Contract Y-621 within two weeks of the opening of the bid. See Plaintiff's Exhibit 5, at p.9 (Compliance Hearing September 5, 1979). H.K. PORTER's tactic in this case has been to put Intransco on trial. The matter of Intransco is as irrelevant to these cross-motions for summary judgment on liability as the subsequent follow-through by DADE COUNTY in enforcing the MBE goal upon Transit Products. Instead, Transit Products, Inc.'s willingness to abide by the 5% goal, and its willingness to substitute Intransco with another firm to comply with the contract, is the matter which is truly relevant to Defendant's liability.

Transit Products steadfastly has maintained that they would comply with the MBE requirement, even if it meant that Intransco would be substituted with another firm. On September 5, 1979, at the Compliance Hearing before Dr. James Corbin, Director of Equal Employment Opportunity, the following exchange took place between Dr. Corbin on the one side and on the other

side Mr. Hugh M. Mize, Jr. and D.G. Thomson, respectively, President and Vice-President of Transit Products, Inc.

> Dr. Corbin: Are you prepared to make that substitution [if Intransco is found not to be a minority firm] after being instructed by us?
>
> Mr. Thomson: I think we might have some difficulty getting the technology, but I am convinced we can put it together.
>
> Dr. Corbin: So, your answer to whether or not you are prepared to make a substitution is . . .
>
> Mr. Mize: Yes. We prefer not to. We hope these people qualify.

Plaintiff's Exhibit 5 at 8.

On December 7, 1979, the following exchange took place between Dr. John Dyer, Contracting Officer and Transit Product's President, Mr. Mize:

> Dr. Dyer: You said, in effect, that in the event there were problems with Intransco in terms of it being legitimately a minority business enterprise, you, one, would be willing to substitute and, two, you felt confident you could substitute.
>
> Mr. Mize: That's correct.

Plaintiff's Exhibit 11 at 8.

This contract award to Transit Products was under continual scrutiny during 1979 by the legislative and executive political branches of the local government--The Dade County Commisison and the administrative mass transit agency--as well as

the federal executive branch (The UMTA) and the federal judicial branch (United States District Court). Again, the position of H.K. PORTER has remained consistent since August 1979--adamantly insisting that no minority subcontractors existed, while Transit Products listed minority businesses in its bid proposal and indicated willingness to substitute another MBE, should Intransco be found not to be a legitimate minority business enterprise. Therefore, the decision to award Metrorail Contract Y-621 to Transit Products was valid, if the MBE provision was valid.

The final question is whether the MBE requirement itself was constitutional. UMTA Circular 1165.1, effective March 1, 1978 (more than one year before the contract in question) cited eight separate sources of authority for the MBE goal: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1; (2) Section 12(f) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1608(f); (3) 49 C.F.R. Part 21; (4) 28 C.F.R. Part 42, Subpart F; (5) Executive Order 11625 (October 13, 1971); (6) Department of Transportation Order 4000.7 "Minority Business Enterprise Program" (March 26, 1975); (7) Department of Transportation Order 1000.12 "Implementation of the Department of Transportation's Title VI Program" (January 19, 1977); and (8) Federal Management Circular 74-7 "Uniform Administration Requirements for Grants-in-Aid to State and Local Governments" (September 13, 1974). See Plaintiff's Exhibit 8 Urban Mass Transportation Administration Circular 1165.1 "MBE Policy and Requirements for Grant Recipients" at page 1-2. The Court will

now turn to the question of whether the 5% minority goal in Contract Y-621 was unconstitutional or otherwise illegal.

V. CONCLUSIONS OF LAW

The minority business enterprise goals at issue in this litigation were mandated by the federal government as a condition of its participating in financing 80% of Metrorail's construction costs. The Urban Mass Transportation Act, 49 U.S.C. App. §§1601-1618 refers to Title VI of the 1964 Civil Rights Act[6] in prohibiting discrimination "under any project, program or activity funded in whole or part through financial assistance" under the Urban Mass Transportation Act. 49 U.S.C. App. §1615(a)(1). Metrorail was such a project funded by the federal government under the Urban Mass Transportation Act. The Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with subsection (a)(1) of the Act. 49 U.S.C. §1615(a)(2)("The Secretary shall take affirmative action to ensure compliance"). Pursuant to the federal requirements, DADE COUNTY's bid invitation for the Metrorail contract at issue included Addendum 3 (the 5% minority business enterprise goal) in response to the Secretary of Transportation's Order 4007.7A and the Urban Mass Transportation Administration's Circular 1165.1. The Court declines to find the provisions in the Act unconstitutional, nor does the Court find the Secretary's order unconstitutional, or DADE COUNTY's contract addendum facially unconstitutional. In light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress

had the power to remedy the effects of past discrimination. DADE COUNTY's modest 5% minority business enterprise goal--not quota--for the Metrorail contract was a valid implementation of Congressional policy.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court upheld a minority business enterprise provision of the Public Works Employment Act of 1977, 42 U.S.C. §§6701-6736, which required at least 10% of any local public works project to be set aside for minority business enterprises. As Defendants correctly note, the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against constitutional challenge in Fullilove. Further, the minority business enterprise goal is not a strict quota of the sort found violative of Title VI of the 1964 Civil Rights Act and the Equal Protection Clause of the Constitution by the Supreme Court in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

The Metrorail contract allowed for a waiver of the 5% minority business enterprise goal, a provision that amounted to an escape mechanism by which H.K. PORTER could justify its inability to meet the 5% goal. At the hearing conducted by JOHN A. DYER, the transportation authority concluded that Plaintiff was not in compliance with the bid invitation's minority contractor participation provisions. H.K. PORTER failed to contact a single minority business in the course of preparing its bid, seeking to justify its inaction by asserting that there were no minority businesses in existence which could perform any

portion of the contract work. H.K. PORTER's bid was rejected, and upon administrative review by the Department of Transportation's Urban Mass Transportaton Administration, Carl B. Richardson, Acting Director, wrote a letter dated December 17, 1979 to Defendant DYER concurring in the award of the Metrorail contract to the second lowest bidder, Transit Products, Inc. See Defendants' Composite Exhibit 2.

The Court has reviewed the transcript of the hearing and concludes, as did Judge Kehoe nearly six years ago, that the hearing complied with constitutional due process requirements. H.K. PORTER presented its claim that one of the two proposed minority contractors in Transit Products' bid (Intransco) was not a true minortiy contractor, yet could not explain away its own total non-compliance.[7]

Defendant DYER's refusal to waive the 5% minority business enterprise goal is justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors. DYER's actions did not violate Florida administrative law, due process, nor were they arbitrary or capricious. See South Florida Chapter of the Asssociated General Contractors of America, Inc. v. Metropolitan Dade County, 723 F.2d 846, 850 (11th Cir. 1984)[8] (Pendent Florida due process and equal protection claims judged constitutional claims because Florida Supreme Court has held tht Florida's due process and equal protection guarantees confer the same protection as their federal counterparts).

Therefore, H.K. PORTER was not entitled to receive the Metrorail contract in question, nor were Plaintiff's legal rights violated by DADE COUNTY when the Defendant awarded the contract to another business. Defendants' motion for summary judgment is granted on the basis that Defendants are not liable to Plaintiff for any alleged damages resulting from the award of Contract Y-621.

DONE AND ORDERED in Chambers at Miami, Florida this 8th day of May, 1986.

Edward B. Davis
UNITED STATES DISTRICT JUDGE

cc: Charles C. Kline, esq.
Robert A. Cuevas, Jr.

FOOTNOTES

[1] Addendum 3 provides in pertinent part that a bidder was required to either:

> (a) involve minority business enterprises (MBE's) in five percent of the contract work; or
>
> (b) demonstrate that:
>
> > "1. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;
> >
> > 2. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not qualified or were Unavailable; and . . .". (Section IIIC of Appendix B p. 4, Plaintiff's Exhibit 1F, admitted in evidence October 19, 1979).

MDC had promulagated this provision in response to DOT's Secretary Order 4000.7A and UMTA's Circular 1165.1 which sought to clarify DOT's MBE's policy and requirements for UMTA grant recipients. An MBE was defined as:

> a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would include, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific-Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity.

(Footnote by Court of Appeals)

---

[2] Porter Co.'s preliminary injunction motion was not ruled on by Judge King; however, Porter Co. was granted a summary judgment which provided essentially the same relief sought by the injunction. (Footnote by Court of Appeals)

---

[3] He specifically found (1) Porter Co. failed to make every reasonable effort to contact and negotiate with MBE's other than

4. Percentage Goals for the Dollar Value of Work to be Awarded to MBEs

Adequate planning is critical to insuring that MBEs have an equitable opportunity to compete for contracts and subcontracts. The applicant should begin this planning by reviewing and evaluating its transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation. Once these have been identified, goals should be set which are practical and related to the availability of minority firms in desired areas of expertise. Goals provide a benchmark for achievement of the MBE program within a specified time frame.

UMTA does not prescribe a methodology that must be followed in setting goals, thereby allowing for flexibility depending on local circumstances. There are several factors, however, which contribute to successful goal setting:

-- Goals should be based on projections of contract awards.

-- Goals should reflect the full range of proposed procurement activity and should not be confined to only one area, such as construction.

-- Different goals should be set by the type of proposed procurement, e.g., one goal for architecture and engineering, another for construction, and another for supplies and services.

-- Achievement of specified MBE subcontract goals or adequate documentation and justification of failure to meet the goals must be required of prime contractors.

-- Goals should be related to the availability of MBEs.

-- Other local MBE goals should be taken into consideration.

The setting of goals is an attempt to match projected procurements with available, qualified MBEs. An MBE is unavailable to perform if it has the knowledge of the terms and specifications of the contract needed to formulate intelligently a proposal for such work or to decline intelligently an opportunity to formulate such a proposal and it does not intend, or is unable, to make a proposal because of lack of interest, inability to meet the reasonable and ordinary demands connected with doing such work, unwillingness to meet the specifications for such work, unwillingness to work on this project or in this geographic area, or such other reason as is determined by the applicant to be sufficient.

The geographic basis for assessing MBE availability will vary with the type of procurement. For example, availability for printers may be confined to the local metropolitan area due to logistics of timely completion of work orders. On the other hand, the availability of A&E firms might be determined on a national basis, since these firms are more mobile. In general, in

defining the geographical boundaries for determining the availability of MBEs in specific trades or professions, the applicant should follow a common sense approach and the customs that the applicant have applied to non-minority firms.

It should be kept in mind that, if the data collected to develop goals, particularly MBE-availability, is inadequate or is assessed in a superficial manner, UMTA may find the goals unacceptable.

Goals should be reviewed at least annually. The review process should analyze the projected versus the actual MBE participation during the previous year. The necessary revisions should be made based on the analysis and submitted to UMTA. Goals, and a description of the methodology used in establishing them, must be submitted to UMTA with each project application.

Supreme Court, U.S.
FILED
DEC 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 87-1001

in the Supreme Court of the United States

H.K. PORTER COMPANY, INC.,
Petitioner,

v.

METROPOLITAN DADE COUNTY,
and JOHN A. DYER,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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By

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LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The following are all parties to the proceedings below:

1. H. K. Porter Company, Inc., was appellant before the Eleventh Circuit and is the petitioner here seeking certiorari; and

2. Dade County, a political subdivision of the State of Florida, and John A. Dyer[1], individually and as contracting officer for contract Y-621, were appellees before the Eleventh Circuit and are respondents to the petition for certiorari.

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[1]As of the date of this brief, Mr. Dyer is general manager of the Southern California Rapid Transit District in Los Angeles, California.

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STATEMENT OF THE CASE

This case constitutes the second federal lawsuit where Petitioner has challenged the basis on which Dade County rejected its bid for Dade County contract Y-621. The Court of Appeals' decision in the prior case detailed the facts and procedural history of the bid and award process for contract Y-621. *See, H.K. Porter Company, Inc. v. Metropolitan Dade County,* 650 F.2d 778 (5th Cir. 1981), hereinafter referred to as *Porter I.*

Porter I was filed in late 1979 after bids for contract Y-621 were received and opened. Petitioner submitted the apparent low bid. *Porter I,* at 780. The second low bidder filed a protest claiming that Petitioner's bid failed to comply with the minority contractor participation provisions of the bid specifications. *Id.* These provisions were required to be included in the bid specifications by the federal grant which financed eighty percent of the cost of Miami's Metrorail project. *Porter I,* at 779. The provisions required a bidder as a condition of award to either involve minority-owned businesses in five percent of the contract work or to demonstrate that it had made every reasonable effort to contact and negotiate with minority-owned businesses in an attempt to subcontract portions of the work and notwithstanding such effort was unable to achieve the goal. *Porter I,* at 780.

In light of the pending bid protest, the county sought to reject all bids and to readvertise the contract. Petitioner filed *Porter I* to stop the county from taking any action with regard to contract Y-621 without first making a determination as to whether Petitioner's bid complied with the contract's minority contractor participation provisions. The district

court in *Porter I* granted the relief sought and ordered the county to conduct an administrative hearing on Petitioner's bid. *Id.* The contracting officer (Respondent John A. Dyer) conducted the required hearing and, based on the evidence presented, determined that Petitioner failed to comply with the contract's minority provisions. *Id.* He recommended award of the contract to the second low bidder. *Id.* The federal transit agency reviewed these findings and concurred in the determination that Petitioner had not complied with the contract's minority business provisions and in the recommendation to award to the second low bidder. *Porter I*, at 780-1.

Upon receipt of the contracting officer's decision, Petitioner obtained an ex parte temporary restraining order which enjoined award of the contract. *Id.*, p. 781. Petitioner also moved for an order directing the county to show cause why it should not be held in contempt for failure to conduct a fair and impartial hearing on Petitioner's bid. *Id.* The county responded by moving to dissolve the TRO. *Id.*

The district court held hearings on these motions and considered extensive evidence and testimony regarding the conduct of the contracting officer's hearing and the basis for his decision and recommendation. During the course of these hearings, Petitioner for the first time claimed that the minority contractor participation provisions were unconstitutional. *Id.* The district court held these provisions constitutional and found that the county's determination to reject Petitioner's bid was not arbitrary or unreasonable. The court dissolved the TRO enjoining award of the contract.

Petitioner filed an appeal and sought a stay pending appeal from the Court of Appeals. *Porter I*, at 781. The stay was denied and thereafter the county awarded contract Y-621 to the second low bidder. *Id.*

The Court of appeals found the appeal moot as Petitioner had only sought equitable relief to prevent award of contract Y-621 which had been awarded during the pendency of the appeal. *Porter I*, at 782. However, because the order dissolving the TRO did not constitute a full trial on the merits, the court concluded that the district court erred in reaching the merits of Petitioner's constitutional objections to the minority business participation requirements of the contract. *Porter I*, at 783. The district court's order was therefore vacated and the case remanded with instructions to dimiss Petitioner's complaint so that the district court's ruling on the constitutional issues would have "no precedential effect." *Id.*

Petitioner subsequently filed the present damage action against Dade County and the contracting officer John A. Dyer for wrongful rejection of its bid, claiming that contract Y-621's minority business requirements were unconstitutional both on their face and as applied to Petitioner's bid. (R. volume I, document 1, pps. 10-11).

Because their every action during the four months from bid opening through rejection of petitioner's bid and award to the second low bidder, had been closely scrutinized by the district court in *Porter I*, Respondents requested the court in the present case to take judicial notice of those prior equitable proceedings. (R. volume II, document 55). The court granted this request and incorporated the

record of *Porter I* in this case. (R. volume III, document 92, p.1).

The district court entered a summary judgment in Respondent's favor on the issue of liability. (R. volume III, document 92). Petitioner appealed to the Eleventh Circuit Court of Appeals which affirmed the district court's judgment. *H.K Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), hereinafter referred to as *Porter II*. This petition for writ of certiorari ensued.

In its statement of the case, Petitioner notes that the county admitted a request for admission that the five percent goal applied to contract Y-621 was not based on any analysis of the availability of qualified minority contractors. Peititoner fails to state however that the county sought to withdraw this admission in light of subsequently discovered evidence (R. volume III, document 63), and that the county proffered testimony and evidence that the goal was derived only after the work comprising contract Y-621 had in fact been analyzed to determine which portions thereof could be subcontracted out, and after those identified portions had been matched with a nationwide directory of known minority firms capable of performing such work. (*See*, R. volume I, supplemental record, transcript of hearing of November 7, 1984, pps.23-32). The Eleventh Circuit's decision noted the fact that the county proffered such information below. *Porter II*, at 332, n.10. An excerpt of the county's proffer comprises the appendix to this brief.

SUMMARY OF ARGUMENT

Reasons for denying certiorari

The first question which Petitioner here seeks to present has already been settled by this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

Petitioner's second question challenges the methodology by which the five percent subcontracting goal was derived for contract Y-621. This question misses the point because under the bid specifications, a bidder who did not meet the goal could nevertheless be awarded the contract if he demonstrated that he had made every reasonable effort in the course of preparing his bid to involve minority businesses in the contract work.

An additional reason for denying review is that the 1977 and 1978 federal regulations at issue in this case have been substantively changed as a result of subsequent Congressional enactment in 1982. Thus, any decision on these outdated regulations would have no applicability to the current law and regulations.

ARGUMENT

Dade County sought bids for contract Y-621 to procure electrified third rail for the Miami Metrorail project. The minority contractor participation provisions which Petitioner here challenges were included in the bid specifications for contract Y-621 in compliance with federal regulations applicable to contracts funded by federal transit grants. These regulations were promulgated while Congress was considering the Surface Transportation Assistance Act of 1978 (Pub.L. 95-599).

Petitioner's first question raises the issue of whether the race-conscious measures in issue are invalid because neither Dade County nor the Department of Transportation made findings of past discrimination. This question overlooks the fact that these measures were specifically approved by Congress during its consideration of the Surface Transportation Assistance Act of 1978, and that such approval occurred in the aftermath of earlier Congressional findings of racial discrimination against minority businesses.

As noted by this Court in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), Congress has previously found that the lack of participation of minority-owned businesses in government contracts is the result of past racial discrimination. Chief Justice Burger (joined by Justices White and Powell) held:

> "Congress had before it, among other data; evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect

to state and local construction contracting as well."

Id., at 478, 100 S.Ct., at 2774. Justice Marshall (joined by Justices Brennan and Blackmun) determined:

> "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination."

Id., at 520, 100 S.Ct., at 2796.

Although *Fullilove, supra,* involved review of the Public Works Employment Act of 1977 (PWEA), this Court held that prior Congressional action and legislation dealing with minority and small businesses could be relied on to provide the requisite findings of past racial discrimination. *Id.*, at 461, 100 S.Ct., at 2767 (Chief Justice Burger) and at 503, 100 S.Ct., at 2787 (Justice Powell).

Consistent with *Fullilove,* the Eleventh Circuit examined the legislative and historical background of the Surface Transportation Assistance Act of 1978 which appropriated money for the federal highway and transit programs. The court noted that the report of the House Committee on Public Works and Transportation on the Act:

> ". . . acknowledged a departmental initiative on behalf of the Department of Transportation ("DOT") to encourage the participation of minority business enterprises in the DOT's programs." (citations omitted)

H.K. Porter Company v. Metropolitan Dade County, 825 F.2d 324, 325 (11th Cir. 1987), *(Porter II)*. The court also analyzed the background surrounding enactment of the 42 U.S.C. §2000d. Based on its review, the court determined that Congress in these legislative enactments was addressing the need to ensure that minority business firms would be provided with a fair opportunity to participate in federally-funded government contracts and therefore it delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state and local level. *Porter II*, at 329. The Eleventh Circuit determined that the federal transportation authorities

> ". . . had the authority, pursuant to the clear and strong Congressional mandate to promulgate the MBE [minority business enterprise] program relative to contract Y-621."

and, that Dade County in implementing the minority business provision of contract Y-621 "was relying on Congress' legislative findings" and was acting

> "pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts."

Porter II, at 329, 330 and 331. In light of such findings, the court determined that Dade County

> "... was not constitutionally required to make additional findings of past discrimination regarding the awarding of this contract."

and that Congress' findings on this issue were sufficient. *Porter II*, at 331. The decision below therefore does not conflict with *Fullilove*.

The decision likewise does not conflict with the Fourth Circuit's decision in *J.A. Croson Company v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). The latter case dealt with a locally initiated race-conscious program. It thus differs from the program at issue in this case and the one reviewed in *Fullilove*, both of which were federally-mandated based on Congressional findings of discrimination. *Croson* recognized this crucial distinction when it made the following statement with regard to *Fullilove:*

> "... The Court upheld the set-aside in *Fullilove* based on Congress's well-founded belief that such a program was needed at the federal level; the Court emphasized the special competence of Congress to act on such a finding."

Id., at p.1360. The holding in *Croson* is thus not applicable to this case and therefore cannot be in conflict with it.

Petitioner's second question challenges how the five percent goal was established for contract Y-621.

This question misses the point because, as the court below noted, there was:

> "... a waiver provision which operated to excuse the bidder from contracting or subcontracting with MBE's if the bidder demonstrated that it had made every reasonable effort to contact and negotiate with MBE's, but was unable to achieve the 5% goal despite such efforts due to the fact that minority contractors were not qualified or not available."

Porter II, at 331. Failure to meet the goal was not dispositive, if the bidder had otherwise made a reasonable effort to locate and contact minority firms. Petitioner's bid was rejected because Petitioner "did not contact a single MBE," i.e., Petitioner made no effort at all. *Porter II*, at 332.

There is one further reason for denying certiorari. The federal regulations here at issue were promulgated in 1977 and 1978. Bids were opened for contract Y-621 in late 1979, and the contract awarded in 1980. Congress reauthorized the federal highway and transit programs by enacting the Surface Transportation Assistance Act of 1982 (Pub.L. 97-424). Included in this Act, was a provision which expressly mandates the participation of businesses owned by socially and economically disadvantaged

persons in transportation contracts. *Id.*, §105(f). Section 105(f) provides:

> "(f) Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 9(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated pursuant thereto."

This provision was adopted in response to this Court's decision in *Fullilove*. Rather than continuing with the concept of minority-owned business, i.e., a business defined solely in terms of the ethnicity of its owner; Congress in Section 105(f) opted for the definition of small business owned by "socially and economically disadvantaged individuals". The Department of Transportation promulgated new regulations effectuating Section 105(f) in July, 1983. 48 Fed.Reg. 33,432 (1983) (codified at 49 C.F.R. §§23.61-.69). These regulations (with minor revisions not relevant to the issues of this case) have been in effect for the past four and one-half years. Congress has retained the ten percent set-aside for businesses owned by socially and economically disadvantaged individuals in the Surface Transportation Assistance Act of 1987 (Pub.L. 100-17, §106(c)). Any review of the outdated regulations thus would not be applicable to the current law or regulations.

CONCLUSION

For the reasons stated and upon the authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

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BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

I, Robert Anthony Cuevas, Jr., a member of the bar of this Court, hereby certify that on the 22nd day of December, 1987, three copies of this Brief in Opposition to Petition for Writ of Certiorari were served by U.S. mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to CHARLES C. KLINE, ESQ., at Mershon, Sawyer, Johnston, Dunwody & Cole, Suite 4500, Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131, attorney for Petitioner.

R A CUEVAS, JR.

Assistant County Attorney

Appendix

H.K. PORTER COMPANY, INC.,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY, et al.,

Defendants.

No. 81-2766-Civ-EBD

United States District Court

Southern District of Florida
Miami Division

Miami, Florida

November 7, 1984

EXCERPT OF TRANSCRIPT OF HEARING BEFORE THE HONORABLE EDWARD B. DAVIS PAGES 23 THROUGH 31

• • •

[By MR. CUEVAS:] Your Honor, again for the record, I preface of [sic] the proffer by noting that all of the witnesses whose testimony we would proffer today were in fact subpoeaned by Mr. Kline, specifically Mr. Delmar Whitington, Mr. William Skeen, Miss Lucia Raiford. They were all subpoeaned and they were subpoeaned duces tecum to bring with them all documents in their possession which relate in any way to the history of past discrimination or which pertained to the five percent MDE [sic] goal.

These were witnesses apparently Mr. Kline had already issued subpoenaes for and was prepared to present testimony about.

Specifically with regard to the witnesses, Your Honor, the first witness would have been Lucia

Davis Raiford who is the present head of the Equal Opportunity Services Division of the transportation agency. She would as head of that division and as custodian of all correspondence and records, the documents that we would have her testify as custodian to merely identify and authenticate all pertain to correspondence between our consultant and Isaac Transit Group and our staff regarding the derivation of the particular goals for the contract in issue.

It relates specifically to a memo dated July 13 from Mr. John Zito to Delmar Whittington who is here in court, regarding breakouts of the various portions of the contract work in terms of dollar value for the purpose of deriving some indication of what portions of the work could be subcontracted.

Attached to those was an actual breakout of the proposed bid form which listed each of the various items by dollar amounts. In addition, there were documents that related, and these were all attached to our motion to withdraw the admission, the documents I'm referring to now, which refer to the status in the spring and fall of 1979, the fact that the County did not have statistics by UMTA of its minority business enterprise plan and correspondence going back and forth from Dr. Dyer, who was then the head of the Transportation Department, to the regional administrator for UMTA in Atlanta which directed specifically, because we did not have this overall MDE [sic] statistics that we were instructed by UMTA to apply goals to each procurement contract.

And these letters predate the issuance of addendum No. 3 on the contract in issue.

The final letter is a letter in response back from Dr. Dyer to Mr. Campion, the Regional Director, saying in response to your direction and meeting with your civil rights staff, this is to advise you that we will in fact apply goals as per your instructions to each of the contracts, each procurement contract of which this contract is one.

Secondly, here is how we are going to do it. It will be based on an availability of known minority businesses out there. It will be based on the potential for subcontract. It would be based on all of the things from a professional and technical viewpoint would be appropriate in devising a goal and applying it to the contract.

These letters are again attached and dated in July and early August of 1979, and of correspondence between the County.

The purpose of having Miss Raiford testify to these documents, Your Honor, because these documents had not been contained in what are called the contract specific files of the department. Normally, things would be filed, Your Honor, by contract number. This particular contract is Y621.

In seeking to respond to Counsel's earlier discovery, the search for the records simply went as far as going back to the Equal Opportunity Services Division and looking for the contract number and what was in there. The documents Miss Raiford, and I have mentioned in this proffer so far, that Miss Raiford would identify, these were apparently misfiled and contained generally in the correspondence files of the Equal Opportunity Services Division, and they were simply filed chronologically with no specific category as to contract or type of work, and

that is the reason why the County had made diligent search of its records and was unable to find these items because Miss Raiford was involved in that as well and then when we went back on a second time on finding out Mr. Whittington had been under subpoena and he was in fact, he was no longer with the Transit Department.

We contacted him. He had indicated that there was in fact a goal study and methodology done and an analysis specifically relating to this contract as to what would be out there in terms of minority businesses and how to match those with particular work at issue.

And she would testify when going back and looking at the general correspondence files a second time, that these documents were come upon and that is they were misfiled and they were in fact public records and simply in the wrong file.

We would next call, Your Honor, Mr. William Skeen, who at the time in July and August of 1979 was the Contracts Manager of the Technical Services Division of the Transit Department.

Mr. Skeen in his capacity was really the person in charge, a conduit through whom all of the various contract language and provisions would come together and be assembled and he would review them. He specifically had documents that we would have presented to the Court which relate initially, and since these have not been — the documents I am now referring to have not been attached as part of any motion or any filing, I perhaps ought to at least proffer them to the clerk to get marked for identification.

But specifically he had advance notice to bidders which went out with this particular contract which lists some twenty or thirty different minority business councils and associations that the County sent notice of this contract to in an attempt to try and generate interest in minority firms and to apprise them of the availability of this contract for bidding.

Specifically, he also had a memorandum from Mr. James Corbin, who was then the head of the Equal Opportunities Division to him which, first of all, set the goal at fifteen percent for this contract and a subsequent confirming memo from the consultant, Kaiser Transit Group, confirming that the goal had been reduced from five percent to fifteen percent.

I might add the timing for the reduction in the goal from fifteen to five percent, the date of that letter corresponds to roughly ten days subsequent to when Mr. Whittington sat down with Mr. Zito and went through the breakout of the contract work and tried to match the availability of firms with the work that was available.

The final document that Mr. Skeen would have is a telegram from the second low bidder asking for additional time to submit their bid because of their receipt of addendum 3 which is the same addendum that Porter was applicable in this case.

It simply shows the second low bidder was under the same time constraints as Porter was.

I would seek to offer these as, I guess, a composite exhibit for identification as relating to what Mr. Skeen would testify.

The next witness, Your Honor, would be Mr. Delmar Whittington. Mr. Whittington was employed

by the Equal Opportunities Services Division in July and August of 1979. He was the person who was directly and personally involved in working on the derivation of the goal. He would testify as to the documents that were — the authenticity of the documents that were attached to our motion to withdraw the two admissions.

The fact that he did sit down with our engineering consultant, Mr. Zito, and the engineer broke out the components of the contract work in issue that Porter bid on and they went through the types of work and the types of firms that could do that work.

Mr. Whittington went through his directory of minority businesses know as the Try Us Directory, which is a list of known minority businesses nationwide. That particular directory was made available in response to answers to interrogatories. We actually attached to our supplementary answers to Porter's interrogatories that are on file.

Mr. Whittington would take the documents that relate to the breakout of the contract work that Miss Raiford had found to have been misfiled and testify as to how those documents were utilized and how the five percent goal was in fact determined for this contract, and the basis therefor.

The final witness, Your Honor, that would be the defendant Dr. John Dyer.

Dr. Dyer at the time in issue was the head of the County's transportation administration and was the contracting officer for the particular contract. Dr. Dyer would relate to the Court the specific history of the attempts to get at minority business statistics from UMTA, the fact that these letters were misfiled that Miss Raiford found that relate to correspon-

dence between himself and the UMTA region set forth the specific directions to him by the relevant Federal agency mandating him, the County, to impose quotas in the County's contracts, saying we would comply.

This is our methodology we would match known minority businesses that were available with the work that is being bid on and set our goals on that basis.

In addition, Dr. Dyer would testify that in the course of his proceedings while this bed [sic] was being review [sic], that UMTA as well was reviewing the decision that would ultimately be made because the question was raised whether the County in whatever decision it made with regard to whom to award to was properly applying minority business requirements of the Federal agency.

Dr. Dyer had correspondence which would indicate from the Civil Rights Division of the Washington Office of UMTA that they specifically asked to review everything that he did at the local level for their review and concurrence or non-concurrence to determine all of the Federal prerogatives were in fact being complied with.

The correspondence indicates, there is a letter dated November 9th from Washington UMTA, the Director of Civil Rights, Harold William, directly to Dr. Dyer, and his responses back on December 12, both to the Washington and to the Regional Office in Atlanta, which said, In response to your November 9th letter, here is my decision as contracting officer, who [sic] is what I propose to do, I find Porter non-responsive, recommend rejection of the bid and recommend awarding of the bid to the sec-

ond low bidder, all based on Porter's lack of compliance with the minority requirements and the fact that TPI did comply.

The final matter, and that is in evidence before Judge Kehoe, it's exhibit, Plaintiff's Exhibit 12, the December 19 hearing in the prior proceedings.

The response back from the Regional Director concurring in Dr. Dyer's decision and an attachment to it from Mr. Harold Williams who specifically finds the County in establishing the five percent goal did so in accordance with the relevant UMTA circular.

So that would be the history and the chronology of what was involved in that regard.

* * *

(5)

Supreme Court, U.S.
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No. 87-1001

In the Supreme Court of the United States

OCTOBER TERM, 1987

H. K. PORTER CO., INC., PETITIONER

v.

METROPOLITAN DADE COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the minority business enterprise (MBE) requirements imposed by the Department of Transportation as conditions for receiving federal funding under the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, are unconstitutional on their face.

2. Whether the rejection by a county government of a bid on an 80% federally funded construction contract for failure to comply with a 5% MBE participation requirement violates the Equal Protection Clause of the Fourteenth Amendment, where the county government was required by a federal agency to establish unspecified goals for MBE participation in order to qualify for federal funding, and where the county government did not purport either to be remedying discrimination specifically traceable to its own prior actions or to derive its 5% MBE goal from evidence relating to past discrimination.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In the Surface Transportation Assistance Act of 1978 (STAA), Pub. L. No. 95-599, 92 Stat. 2689, Congress appropriated federal money to assist state and local public bodies in financing the construction of highways and mass transportation systems. The STAA directed state and local public bodies desiring such federal assistance to submit appropriate project proposals to the Secretary of Transportation and to have those proposals approved by him (§ 302(a), 92 Stat. 2735-2736, 49 U.S.C. App. 1602). In addition, it provided, in 49 U.S.C. 1615(a)(1), that "[n]o person in the United States shall on the grounds of race, color, creed, national origin, sex, or age be excluded from participation in, or be denied the benefits of, or be subject to discrimination under, any project, program, or activi-

ty funded in whole or in part through financial assistance under this chapter" and that this non-discrimination requirement was "to be in addition to and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*]". Further, the Secretary was required to "take affirmative action to assure compliance with [Section 1615(a)(1)]" (49 U.S.C. App. 1615(a)(2)), and, "[w]henever the Secretary determines that any person receiving financial assistance • • • has failed to comply with • • • [it], • • • the Secretary • • • shall require necessary action to be taken to assure compliance • • •" (49 U.S.C. App. 1615(a)(3)(A)). Finally, the STAA authorized the Secretary "to undertake • • • national and local programs that address human resource needs as they apply to public transportation activities," including "training and assistance for minority business opportunities" (49 U.S.C. App. 1616).

In the wake of the STAA's enactment, the Urban Mass Transit Administration (UMTA) of the Department of Transportation (DOT) required all state and local public bodies seeking federal financial assistance for the construction of highway and mass transportation projects to comply with UMTA Circular 1165.1, *Interim Minority Business Enterprise Policy and Requirements for Grant Recipients* (Dec. 30, 1977) [hereinafter Circular], a directive that UMTA had previously issued in connection with its oversight responsibilities under the Urban Mass Transportation Act of 1964, 49 U.S.C. App. 1601-1618. The Circular obligated applicants for grants in excess of one million dollars to establish affirmative action programs for minority business enterprise (MBE) participation in order to further UMTA's "policy that MBEs shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds" (Circular 2). For this purpose, it defined an MBE to be "a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons[,]" where "[s]uch disadvantage may arise from cultural, racial, chronic economic circumstances or background, or other similar cause. Such persons would in-

clude, but not be limited to, Blacks (not of Hispanic origin); Hispanics; Asians or Pacific Islanders; American Indians or Alaskan Natives; and women, regardless of race or ethnicity" (*id.* at 3). Furthermore, the Circular specified that the contemplated affirmative action plan had to include, inter alia, a policy statement concerning the applicant's commitment to use MBEs; a liaison officer and staff, as required, to administer an MBE program; procedures to ensure that known MBEs have an equitable opportunity to compete for contracts and subcontracts, including access to information and communication programs to make MBEs aware of opportunities and means by which MBEs may be assisted in overcoming barriers to program participation; and "[p]ercentage goals for the dollar value of work to be awarded to MBEs" (*id.* at 4). But the Circular did not prescribe a methodology for applicants to follow in setting the required percentage goals; rather, to ensure "flexibility depending on local circumstances," it left the goal-setting responsibility entirely with the state and local public bodies seeking the federal funding. See *Instructions for the Development of a Minority Business Enterprise Program Pursuant to UMTA C 1165.1, at 6 (Dec. 30, 1977) [hereinafter Instructions].*[1]

In addition to requiring compliance with the Circular, the UMTA began requiring applicants for federal financial assistance in the construction of highway and mass transporta-

[1] The Circular made clear, however, that applicants should review and evaluate their "transportation improvement program to identify those procurement activities which have the greatest potential for MBE participation," and set goals "which are practical and related to the availability of minority firms in desired areas of expertise" (Instructions 6). It further stated that the purpose of the goals is to "provide a benchmark for achievement of the MBE program within a specified time frame" (*ibid.*). It identified "several factors • • • which contribute to successful goal setting," including setting the goals "related to the availability of MBEs," setting different goals "by the type of proposed procurement," taking into consideration "other local MBE goals," and requiring prime contractors to provide "adequate documentation and justification of failure to meet the goals" (*ibid.*); the applicant was to review the goals at least annually and revise them where appropriate (*id.* at 7). The Circular further stated that requests for proposals should make clear that price alone would not be an acceptable basis for rejecting MBE bids (*id.* at 9).

tion projects to comply with DOT Order 4000.7A, *Minority Business Enterprise Program* (Mar. 6, 1978) [hereinafter Order], a directive that the Secretary had promulgated to "increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department," on the theory that these persons "have traditionally been under-represented as owners and managers of businesses in this country" (Order 1). The Order defined an MBE to be a business that is owned and controlled by at least one "individual who [is] Black, Hispanic, Asian American, American Indian, Alaskan native, or a woman regardless of race or ethnicity" (Order 2). It directed each "operating element" within the DOT to require applicants for financial assistance "to present for approval * * * an affirmative action program to promote minority business enterprise" participation (*id.* at 6), including "[p]ercentage goals for the dollar value of work to be awarded to MBEs and reasonable written justification for those goals" (*id.* at 8). Like the Circular, however, the Order did not specify the standards that were to be used in establishing these MBE participation goals.

2. After the STAA was enacted and the UMTA began conditioning STAA funding on compliance with the Circular and the Order, respondent Metropolitan Dade County (MDC) proposed to construct a rapid transit system for the metropolitan area of Miami, Florida, and to have the UMTA fund 80% of the cost of the electrified third rail of the project with STAA monies. See Pet. App. 5; *H.K. Porter Co.* v. *Metropolitan Dade County*, 650 F.2d 778, 779-780 (5th Cir. 1981). After consulting with UMTA, MDC included in its bid specifications a requirement that each bidder either involve MBEs in 5% of the contract work or demonstrate that every reasonable effort to contract and negotiate with minority contractors had been made and that minority contractors simply were not "qualified" or "available" to do the work (Pet. App. 7-8).[2] A contractor was

[2] Like the Circular and the Order, the bid specification defined MBEs to be businesses that are owned or controlled by "individual[s] who [are] Black, Hispanic, Asian American, American Indian, Alaskan native, or [] wom[e]n[,] regardless of race or ethnicity" (Tr. Ex. 1, Addendum No. 3, App. B at 1).

"unqualified" if it was legally ineligible to perform specific work or did not have the licenses, skills, experience, or manpower necessary to comply with MDC's performance schedule; demanding a higher price for doing the work was not necessarily a disqualifying factor. See Tr. Ex. 1, Addendum No. 3, App. B at 2; Tr. Ex. 15, at 24. A contractor was "unavailable" if it was qualified to do specific work but did not intend or was unable to make a proposal because of a lack of interest, an unwillingness to meet specifications, or an unwillingness to work in the pertinent geographical area; again, demanding a higher price for doing the work was not necessarily a disqualifying factor. Tr. Ex. 1, Addendum No. 3, App. B at 2-3; Tr. Ex. 15, at 24.

MDC received three bids in response to its solicitation (Pet. App. 8). Petitioner, H.K. Porter Company, submitted the lowest bid, but left blank the MBE compliance component of the bid form and instead indicated separately that no minority firms produced any of the four products that it could not itself provide (*id.* at 8-9).[3] The second lowest bidder, Transit Products, Inc., protested that qualified minority contractors were available and that it had satisfied the MBE participation requirement (*id.* at 28). MDC therefore held a compliance proceeding, on November 28, 1979, before respondent John Dyer, the county's contracting officer (*id.* at 29). Dyer found that qualified MBEs were in fact available and that petitioner had failed to make every reasonable effort to negotiate and contract with them. See *H.K. Porter Co.* v. *Metropolitan Dade County,* 650 F.2d at 780 n.3. He therefore recommended that the contract be awarded to Transit Products (Pet. App. 29). UMTA concurred in Dyer's decision (650 F.2d at 780-781).

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[3] Petitioner later explained (Pet. App. 9) that it had recently invested in an in-house assembly plant in Chicago and that, due to its in-house assembly plant, only four items from outside sources were necessary to fulfill the contract. Petitioner further stated (*id.* at 9-10) that no minority firms produced any of these four items and that, because of the nature of its in-house plant, it was "economically impracticable" to break down the contract in an attempt to subcontract to MBEs. Petitioner also noted that its Chicago plant employed 33 workers, all of whom were minorities (*id.* at 45).

3. Petitioner immediately brought suit against MDC and Dyer, seeking a temporary restraining order against the contract's award, and alleging that the 5% MBE participation requirement exceeded the authority established by the STAA and violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Pet. App. 29-30). In addition, petitioner moved for leave to add the Secretary as a party defendant (*id.* at 30). But the district court denied both motions, ruling that the 5% MBE contracting goal was consistent with the STAA, Title VI, and the Constitution (*ibid.*), and declining without discussion to join the Secretary as a party defendant (*ibid.*).

Petitioner filed a timely notice of appeal with respect to the decision on the merits; the United States, participating as an amicus curiae (since petitioner did not appeal the district court's decision on the joinder issue), filed a brief defending the constitutionality of the Circular and the Order. The court of appeals concluded, however, that the case was moot. Pet. App. 31; *H.K. Porter Co.* v. *Metropolitan Dade County*, 650 F.2d 778 (5th Cir. 1981). It reasoned that petitioner sought only to enjoin the awarding of the contract and that, since MDC had awarded the contract to Transit Products while the case was pending on appeal, it could not grant petitioner such relief (*id.* at 782). It thus vacated and remanded with instructions that the district court's order be treated as having no "precedential effect" (*id.* at 783).

4. Petitioner thereupon instituted this action for damages against MDC and Dyer (Pet. App. 10), alleging that the 5% MBE participation requirement, on its face and as applied to petitioner, violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. 1981, 42 U.S.C. 1983, 42 U.S.C. 2000d, and 49 U.S.C. App. 1615.[4] Respondents MDC and Dyer answered that the 5% MBE requirement had been imposed only to comply with the conditions that UMTA placed on the receipt of federal funding and that those conditions were valid under

[4] Petitioner also asserted a claim under Florida administrative law, but no longer pursues that claim. See Pet. App. 10, 23.

this Court's decision in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). Respondents conceded, however, in response to petitioner's request for admissions, that " 'no representative or official of the County or of the United States Department of Transportation made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with [the] [c]ontract * * *' " (Pet. App. 32 (citation omitted)). They further admitted that " '[t]he 5% participation requirement * * * was not based upon a previous investigation or calculation made by [respondents] or UMTA" (*ibid.*).[5]

On the parties' cross-motions for summary judgment, the district court entered judgment for respondents (Pet. App. 24-55). It noted (Pet. App. 49) that "[t]he Congress gave the Secretary of Transportation the responsibility to take affirmative action to assure compliance with [the non-discrimination provision] of the [STAA]," and that MDC's "bid invitation * * * included * * * the 5% minority business enterprise goal * * * in response to the Secretary of Transportation's Order 400[0].7A and the [UMTA's] Circular 1165.1." The court then held that, "[i]n light of Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level, Congress had the power to remedy the effects of past discrimination" and that MDC's "modest 5% minority business enterprise goal—not quota—for the Metrorail contract was a valid implementation of Congressional policy" (Pet. App. 49). The court added that "the 5% minority business enterprise goal provision at issue in this case is less burdensome than the 10% minority business enterprise quota upheld against

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[5] Respondents later moved to withdraw these admissions and to proffer evidence allegedly showing that the 5% MBE participation requirement was established only after MDC had determined which portions of the contract could be subcontracted out and what nationally known minority firms were capable of performing such work (Pet. 4; Pet. App. 32). But the district court denied the motion, finding that "there was no evidence to contradict the admissions" (*ibid.*), and that "this information should have been discovered long ago and presented to [petitioner], and it would be prejudicial at this late stage in the proceeding to allow the withdrawal" (Tr. 19-20).

constitutional challenge in *Fullilove*" (*id.* at 50); that the contract "allowed for a waiver of the 5% minority business enterprise goal" (*ibid.*); and that respondents' "refusal to waive the 5% minority business enterprise goal [was] justified on these facts, particularly in light of the second-lowest bidder's ability to find minority-owned subcontractors" (*id.* at 51).

5. The court of appeals affirmed (Pet. App. 1-23). It held that the MBE participation requirement was constitutional on its face and also as applied to petitioner (*id.* at 11, 23).

As to the facial attack, the court noted its agreement with petitioner that "the use of racial, ethnic or sexual preferences as a basis to award government contracts appears to be contrary to the clear language of the statutes" (Pet. App. 12). It further reasoned, however, that "the prohibitions against discrimination contained in [42 U.S.C.] 2000d and 49 U.S.C. 1615(a)(1) [must be analyzed] in light of the legislative and historical context in which the acts arose" (Pet. App. 12-13, relying on *Steelworkers* v. *Weber*, 443 U.S. 193 (1979)), and that the "background giving rise to the promulgation of [Section] 2000d and [Section] 1615(a)(1) clearly indicates that Congress was addressing the need to ensure that minority firms would be provided with a fair opportunity to participate in federally-funded government contracts. Indeed, in § 1615(a)(2) of the Act, Congress delegated to the Secretary of Transportation the responsibility to take affirmative action to assure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state, and local level" (Pet. App. 14). The court thus held that "UMTA had the authority * * * to promulgate the MBE program relative to [the] contract" and that, under *Fullilove* v. *Klutznick, supra*, the MBE program was constitutional on its face (Pet. App. 14).

As to petitioner's argument that the MBE provisions of the contracts were unconstitutional as applied, the court initially noted that, under *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), a preferential classification based upon racial or ethnic distinctions "must be justified by a compelling government interest" and "be narrowly tailored to the achievement of that goal"

(Pet. App. 17). The court then ruled that, with respect to the first prong of the *Wygant* test, "MDC, in implementing the MBE provisions of [the] contract * * *, was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts" (*id.* at 18). Citing *Fullilove* v. *Klutznick, supra*, the court rejected petitioner's contention that "MDC was required to make detailed and specific findings concerning past discrimination" (Pet. App. 20). It reasoned that MDC "was relying on Congress' legislative findings which clearly established that minorities were not participating in government contracts" and that, in these circumstances, Congress's "findings provide adequate support for such local projects" (*ibid.*).

The court similarly ruled, with respect to the second prong of the *Wygant* test, that the 5% goal was narrowly tailored to achieve the stated goal of fostering greater minority participation in government contracts (Pet. App. 19). While it was concerned that "[t]he record does not suggest that MDC conducted * * * detailed studies regarding past discrimination against MBE's in the awarding of construction contracts or investigations regarding the availability of MBE's qualified to participate in [the] contract * * * (*id.* at 21), it rested on the fact that "federal courts have upheld affirmative action programs utilizing figures much higher than the modest 5% figure MDC implemented in this case" (*ibid.*) and that, indeed, this Court in *Fullilove* "approved the use of a 10% MBE goal as sufficiently narrowly tailored to be a constitutionally acceptable means of redressing the present effects of past discrimination" (*id.* at 21-22). It added that "MDC's implementation of this affirmative action program does not unnecessarily trammel the interest of non-minority contractors or sub-contractors" such as petitioner, since "[a]ll that was required * * * was that [petitioner] demonstrate that it had made every reasonable effort to meet the 5% MBE provision, or demonstrate that it was unable to do so despite such efforts because minority contractors were not qualified or were not available" (*id.* at 22).

DISCUSSION

1. Petitioner first asks (Pet. i, 10-11) this Court to decide whether the MBE requirements imposed by the DOT as conditions for receiving federal funding under the STAA are unconstitutional on their face. But petitioner does not suggest that there is a conflict among the circuits concerning whether UMTA Circular 1165.1 and DOT Order 4000.7A are facially constitutional. Nor can it suggest that the question is likely to recur; as respondents note (Br. in Opp. 10-11), Congress has since extensively amended the STAA,[6] and the Secretary has replaced the Circular and the Order with regulations specifically designed to implement the new statutory provisions.[7] In any event, petitioner was unsuccessful in his motion to join the Secretary as a party defendant in this litigation, and did not pursue that issue on appeal. As a result, the Secretary has not been afforded an opportunity to develop a record from which to defend the constitutionality of the Circular and the Order (which, prior to becoming defunct, implemented other statutes as well). In view of all these circumstances, as well as the additional fact that petitioner's constitutional rights can be adequately analyzed and protected in the factual context of its challenge to MDC's specific MBE program (see *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 23-24), we submit that the facial challenge to the Department of Transportation's program does not merit certiorari review.

2. Petitioner next asks (Pet. i, 11-15) the Court to decide whether the rejection of its bid for failure to comply with the 5% MBE participation requirement of MDC's bid solicitation violates the Equal Protection Clause. As we explain below, this is a substantial federal question and, depending upon what the

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[6] See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100 (establishing 10% contracting goal for "socially and economically disadvantaged individuals"); Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145 (same).

[7] See 48 Fed. Reg. 33432 (1983), codified at 49 C.F.R. Pt. 23; 52 Fed. Reg. 39230 (1987), codified at 49 C.F.R. Pt. 23.

Court decides in *City of Richmond* v. *J.A. Croson Co.*, prob. juris. noted, No. 87-998 (Feb. 22, 1988), may eventually merit this Court's attention.[8]

This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality' " (*Loving* v. *Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). While a majority of the Court has yet to agree upon the precise standard of review applicable in cases challenging governmentally imposed racial or ethnic classifications that favor groups which have suffered discrimination in the past, the Justices have indicated that classifications of this type can be justified only by especially weighty governmental interests and must be carefully constructed to effectuate those governmental interests.[9] Upon close review of this Court's most recent decisions on this sub-

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[8] The court below treated all of petitioner's statutory claims as being essentially co-extensive with its constitutional claim. While this approach is supportable with respect to the Title VI claim (see *Regents of University of California* v. *Bakke*, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 348-350 (opinion of Brennan, J., joined by White, J., Marshall, J., and Blackmun, J.)), it is less supportable with respect to petitioner's claims under 49 U.S.C. App. 1615, which is "in addition to and not in lieu of the provisions of Title VI," and 42 U.S.C. 1981, which prohibits race discrimination against individuals in contracting, including discrimination against white persons (see *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976)). The petition does not, however, seek certiorari review of this aspect of the court of appeals' judgment and, accordingly, we do not further address it at this time.

[9] See, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 274 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.) (any racial classification must be justified by "compelling governmental interest" and be "narrowly tailored to the achievement of that goal"); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J., joined by White, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); *Fullilove* v. *Klutznick*, 448 U.S. at 537 (Stevens, J., dissenting) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 301-302 (opinion of Marshall, J., joined by Brennan, J., and Blackmun, J.) ("remedial

ject, we conclude that the rejection of petitioner's bid for failure to comply with MDC's 5% MBE participation requirement probably cannot withstand such judicial scrutiny.[10]

Respondents offer no independently compelling or important interest on the part of MDC that might reasonably be found to justify the race-based rejection of petitioner's bid. They have not suggested that their race-based action was designed to promote any form of racial diversity viewed by Members of this Court as legitimate. See *Regents of University of California* v. *Bakke*, 438 U.S. 311-315 (opinion of Powell, J.); cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 314-316 (Stevens, J., dissenting). Nor have they suggested that their race-based action was designed to remedy prior discrimination traceable to actions by MDC. See *id.* at 274-278 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.); *id.* at 288 (O'Connor, J., concurring). Rather, they have candidly admitted that MDC was interested only in ensuring the receipt of federal funding. See Tr. Ex. 15, at 24. But, while the interest in receiving or saving money is clearly rational (*Lyng* v. *Automobile Workers*, No. 86-1471 (Mar. 23, 1988), slip op. 12), such a governmental purpose is not sufficiently "compelling" or "important" to sustain a racial classification. See *Plyler* v. *Doe*, 457 U.S. 202, 227-230 (1982) (preservation of state resources does not justify denial of education to children of undocumented aliens); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974) ("a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham* v. *Richardson*, 403 U.S. 365, 374-375 (1971) ("a con-

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use of race is permissible if it serves 'important governmental objectives' and is 'substantially related to achievement of those objectives' ").

[10] As noted earlier, when this case first reached the court of appeals in 1981, the United States filed an amicus brief defending the facial constitutionality of the Circular and the Order. In the course of that defense, the United States suggested at various points that MDC's MBE participation requirement was likewise constitutional. See U.S. Br. 12-13, 19-21, 21-26. In light of this Court's more recent cases on this subject, especially *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, we have concluded that those suggestions were incorrect.

cern for fiscal integrity is no[t] [a] compelling justification" for denying welfare benefits to resident aliens).

Rather than rely on a "compelling" or "important" interest on the part of MDC, respondents argue (Br. in Opp. 5-9) that the governmental purpose necessary to sustain MDC's 5% MBE participation requirement may be derived from the STAA. More specifically, respondents contend: (a) that, in the STAA, Congress made findings with respect to past discrimination in construction contracting nationwide; and (b) that MDC's MBE program is derivatively justifiable as a remedy for this prior discrimination found by Congress. But these contentions raise more questions than they answer.

First of all, it is quite doubtful that Congress contemplated that the 1978 STAA would impose or authorize a percentage MBE utilization requirement or that Congress made the findings of prior discrimination necessary to support such a provision. In contrast to Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), which the Court in *Fullilove* found to be remedial in purpose and supported by a prior history of discrimination, no provision of the 1978 STAA on its face mandates preferences for MBEs or suggests that the 1978 STAA was intended to be in any part a race-conscious remedy for prior discrimination in the construction industry. On the contrary, the STAA explicitly states that "[n]o person * * * shall on the grounds of race * * * be subject to discrimination under any project * * * funded in whole or in part through financial assistance under [the STAA]" (§ 314, 92 Stat. 2750). Moreover, while Congress did provide that the Secretary should take "affirmative action" in administering the STAA, it specified that the object of such affirmative action was to be "compliance with" the statute's non-discrimination requirement (*ibid.*); it did not suggest that the Secretary should take affirmative action to remedy discrimination that pre-existed the enactment of the statute. Nor does the fact that Congress enacted the STAA's non-discrimination and affirmative action requirements shortly after it adopted Section 103(f)(2) of the PWEA, and against the same "backdrop of legislative and administrative programs"

from which the necessary remedial purpose was derived in *Fullilove* (448 U.S. at 467), suggest that Congress meant implicitly to embody similar MBE utilization requirements in the STAA or that an additional racial remedy was justified by the prior discrimination. Nothing in the legislative history of the STAA indicates that Congress found the PWEA (not to mention Title VI) inadequate fully to remedy the prior discrimination it had so found or, more importantly, that the STAA was to be a remedial supplement to the PWEA program.[11]

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[11] To be sure, as the court below noted (Pet. App. 4), "the House report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the Department of Transportation ('DOT') to encourage the participation of minority business enterprises in the DOT's program." But nothing in this House report suggests that Congress viewed either the STAA or the cited departmental initiative as a remedy for prior, identified discrimination in the construction industry. See H.R. Rep. 95-1485, 95th Cong., 2d Sess. 71 (1978). Indeed, this passage in the House report is not tied to any provision of the House bill, much less to the non-discrimination and affirmative action provisions (which originated in the Senate bill as a means for consolidating the civil rights enforcement authority of the UMTA). See H.R. Conf. Rep. 95-1797, 95th Cong., 2d Sess. 136 (1978); S. Rep. 95-857, 95th Cong., 2d Sess. 4, 26 (1978). Thus, the passage in the House report cannot fairly serve as evidence of any remedial intent on the part of the enacting Congress. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950); see generally *Int'l Bhd. of Elec. Wkrs.* v. *NLRB*, 814 F.2d 697, 715-718 (D.C. Cir. 1987) (Buckley, J., concurring); *Hirschey* v. *FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

Nor can the necessary remedial intent be found in the Circular or the Order. While the Circular and Order plainly required applicants for federal financial assistance under the STAA to adopt percentage goals for MBE participation, they were justified only as a means of increasing the participation of MBEs in the performance of contracts financed with federal funds, and not as a remedy for prior, identified discrimination. See Circular 2 (affirmative action program established in order to ensure that MBEs "have the maximum opportunity to participate in the performance of contracts financed in whole or in part with UMTA funds"); Order 1 (MBE requirements imposed to "increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department," as these persons "have traditionally been underrepresented as owners and businesses in this country").

Moreover, even if the Circular or Order had purported to make findings of prior discrimination, we note that Members of this Court have raised the

Furthermore, it is also doubtful that respondents can properly rely upon any remedial purpose Congress may have had as a derivative justification of MDC's MBE participation requirement. In *Fullilove*, the Court (with no majority opinion and three dissenting Justices) held that Congress's findings of prior nationwide discrimination in the construction industry were sufficient to sustain Section 103(f)(2) of the PWEA against facial constitutional attack. But the Court had no occasion, and thus declined, to address any questions relating to specific applications of that MBE program, including the question whether Congress's findings of prior discrimination, which were of a general type, relieved applicants for federal financial assistance of showing that such discrimination was in fact specifically traceable to them. See 448 U.S. at 453, 471, 480-481, 486, 487-488 n.73 (opinion of Burger, C.J.).

Subsequently, however, in *Wygant*, five Justices apparently rejected the argument that a governmental actor may grant racial preferences in order to remedy prior "societal" discrimination—*i.e.*, discrimination that is not traceable to actions by that governmental actor. See 476 U.S. at 274-278 (opinion of Powell, J., joined by Burger, C.J., Rehnquist, J., and O'Connor, J.); *id.* at 288 (opinion of O'Connor, J.); *id.* at 294-295 (opinion of White, J.). And, more recently, the Court has indicated that a state or local government may rely on a federal program in defending against an equal protection challenge only

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question whether the head or component of an agency is competent to provide racial preferences under the authority of either Section 5 of the Fourteenth Amendment or the Spending Power. See, *e.g.*, *Fullilove* v. *Klutznick*, 448 U.S. at 468; *id.* at 515-516 n.14 (Powell, J., concurring); *Regents of University of California* v. *Bakke*, 438 U.S.. at 309-310 (opinion of Powell, J.); cf. *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 292 (O'Connor, J., concurring) ("competent" authority required). This question takes on especially serious proportions where, as here, the administrative agency does not have a mandate from Congress to make such findings or to provide such preferential treatment. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114-116 (1976); cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16-18 (1981) (affirmative duties may not be imposed on states via Section 5 of the Fourteenth Amendment or the Spending Power unless, at a minimum, Congress has "unambiguously" spelled out those duties); see generally *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

where it had "no choice" but to follow the dictates of the federal program. See *Papasan* v. *Allain*, slip op. 23. Here, of course, MDC was not required to participate in the federal funding program, and there is no reason to believe that "the financial inducement offered by Congress [was] * * * so coercive as to pass the point at which 'pressure turns into compulsion' " (*South Dakota* v. *Dole*, No. 86-260 (June 23, 1987), slip op. 7 (citation omitted)). Thus, it appears that respondents cannot derive a sufficient remedial purpose for their own particular MBE utilization program from any national findings of prior discrimination that Congress may have made.

In any event, MDC's 5% MBE participation program also fails the requirement that, as a racial classification, it be carefully constructed to effectuate its remedial purpose. Neither Congress nor the Department of Transportation has undertaken in any way to determine the extent to which various minority groups or contractors have been victimized by discrimination. Indeed, the Circular and the Order expressly decline to prescribe a methodology for applicants to follow in setting their percentage goals. See Instructions 6; Order 9-10. And, as respondents admitted in the district court (Pet. App. 32 (citation omitted)), " 'no representative or official of the County * * * made an investigation to determine whether five percent MBE participation was a reasonably obtainable goal or quota in connection with [the] [c]ontract * * *. The 5% participation requirement of [the contract] was not based upon a previous investigation or calculation made by [respondents] or UMTA.' " Indeed, the across-the-board percentage preference for all businesses owned or controlled by individuals in the favored groups was apparently imposed without regard to the actual history of prior discrimination against all or any of the favored groups, and without attention to such issues as whether each group suffered prior discrimination to the same degree as the other groups, whether the individuals in a particular group had already overcome the effects of any prior discrimination, or whether the particular beneficiaries of the preference had actually been victims of prior discrimination. Likewise, there has been no claim that

respondents considered, in determining the percentage figure for each group, the relative strength of non-minority competitors' qualifications, the efficacy of alternative remedies for any prior discrimination that Congress may have found, or the problem of identifying the particular minorities who were to be benefited. In these circumstances, respondents cannot plausibly claim that they carefully constructed their program to achieve the asserted purpose of remedying prior discrimination. See *United States* v. *Paradise*, No. 85-999 (Feb. 25, 1987), slip op. 19-32 (opinion of Brennan, J.); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 284 n.13 (opinion of Powell, J.); *id.* at 293-294 (opinion of O'Connor, J.); *Regents of University of California* v. *Bakke*, 438 U.S. at 315-320 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. at 532-554 (Stevens, J., dissenting).

Respondents object (Br. in Opp. 4) that they attempted to withdraw the above-referenced admissions and to proffer evidence showing that MDC established the 5% goal only after determining which portions of the contract could be subcontracted out and what nationally known minority firms were capable of performing that work. But the district court denied this motion (Tr. 19-20), finding that "this information should have been discovered long ago," and that "it would be prejudicial at this late stage in the proceeding to allow the withdrawal." It is therefore improper for respondents to raise this objection now. In any event, as the district court also found (Pet. App. 32), the proffer did not "contradict the admissions." Taking the proffer at face value, the simple comparison of the percentage of nationally known minority firms capable of performing the work with the percentage of those retained to do the work *on this particular contract* is no serious effort to identify the extent of actual discrimination, either present or past. Thus, whatever it proves, the proffer does not establish that the program was tailored to a remedial purpose.

To be sure, as respondents note (Br. in Opp. 5, 9-10), MDC had a waiver provision for bidders that did not meet the 5% MBE preference requirement. But the waiver provision only

sought to avoid denial of contract awards for failure to retain unqualified or unavailable MBEs (where qualifications and availability were determined without regard to price). It otherwise inflexibly required bidders to meet the 5% MBE requirement (see pages 4-5, *supra*) and, in any event, did not ensure that the minority groups receiving preferences had been properly identified, that particular minority groups were benefited only to the degree of the actual prior discrimination against them, or that individuals of minority groups who had already overcome the effects of prior discrimination were not benefited. Thus, it did not ameliorate the tailoring problem that existed in this program.

3. The question remains whether the contrary judgment of the court below merits review by the Court at this time. On the one hand, dozens of state and local governments, as well as a variety of federal statutes and administrative regulations, have established set-aside programs—mostly after this Court's affirmance in *Fullilove* of the facial constitutionality of the PWEA program.[12] This fact alone suggests a pressing need for serious constitutional reflection. Further, the courts of appeals are deeply divided over the constitutionality of these programs.[13]

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[12] See, *e.g.*, United States Conference of Mayors and United States Department of Commerce, *1986 National City Profiles: Report on Minority Enterprise Development Program* 1 (1986); 15 U.S.C. (& Supp. IV) 637(d)(1), (6)(A); 22 U.S.C. 2151; 28 U.S.C. 450e(b); 24 C.F.R. 570.424(d)(2), 570.428(d)(2); 36 C.F.R. 906.1(a), (c), 906.3(a).

[13] Compare *Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167 (6th Cir. 1983) (upholding the facial constitutionality of a state statute that annually reserved for minorities set percentages of state contracts); *Schmidt* v. *Oakland Unified Sch. Dist.*, 662 F.2d 550 (9th Cir. 1981), vacated on other grounds, 457 U.S. 594 (1982) (upholding constitutionality of local government's set-aside plan based on statistical disparity between the minority population of the community and the minority business enterprises that had benefited from the award of school construction contracts); *South Fla.. Chapter of Assoc. Gen. Contractors* v. *Metropolitan Dade County*, 723 F.2d 846 (11th Cir.), cert. denied, 469 U.S. 871 (1984) (upholding facial constitutionality of bidding procedures that required 50% of each contract's value to be subcontracted to black contractors); with *J.A. Croson Co.* v. *City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), prob. juris. noted, No. 87-998 (Feb. 22, 1988) (holding un-

On the other hand, the Court has recently noted probable jurisdiction in *City of Richmond* v. *J.A. Croson Co.*, prob. juris. noted, No. 87-998 (Feb. 22, 1988) and the Court's decision in that case will do much to resolve the conflict and undoubtedly shed much light on the burden that state and local governments bear in justifying their MBE programs. Accordingly, although this case is distinguishable from *J.A. Croson Co.* because it involves (a defunct) federal-state (as opposed to a purely non-federal) set-aside program, the petition should be held pending the decision in *J.A. Croson Co.* and then disposed of as is appropriate in light of the judgment rendered therein.

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constitutional set-aside plan that rested on brief statements concerning generalized racial discrimination in local construction industry and statistical disparity between black population and black-owned businesses); *Michigan Road Builders Ass'n* v. *Milliken*, 834 F.2d 583 (6th Cir. 1987) (holding unconstitutional a state set-aside plan that was not a response to prior discrimination by the state); and *Associated Gen. Contractors* v. *City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (holding unconstitutional a set-aside ordinance that was not based on reliable evidence of prior discrimination by the enacting city).

CONCLUSION

The petition should be held pending the Court's decision in *City of Richmond* v. *J.A. Croson Co.*, No. 87-998, and disposed of as is appropriate in light of the judgment rendered therein.

Respectfully submitted.

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Case No. 87-1001

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OF THE
United States

H.K. PORTER COMPANY, INC.,
Petitioner,

VS.

METROPOLITAN DADE COUNTY,
and JOHN A. DYER,
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN RESPONSE TO INTERVENING AMICUS BRIEF OF THE UNITED STATES

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INTRODUCTION

This supplemental brief is submitted in response to the intervening amicus brief of the United States.

DISCUSSION

The United States concedes (Br. of U.S. 10) this case does not independently merit certiorari review. Nevertheless, it recommends (Br. of U.S. 10 and 11) the case be held because it "may eventually merit this Court's attention" depending on what the Court decides in *City of Richmond v. J.A. Croson, Co.*, prob. juris. noted No. 87-998, Feb. 22, 1988. The government makes this recommendation notwithstanding its recognition that "this case is

distinguishable from *J.A. Croson Co.*...." (Br. of U.S. 10).

What makes this case distinguishable is the fact that the minority subcontractor goal here in issue was federally mandated based on Congressional findings of discrimination (See, Br. in Opp. 7-9). The Court has recognized Congress' unique authority in this area. Thus, in *Fullilove v. Klutznick,* The Court noted:

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

448 U.S. at 483-84 (opinion of Burger, C.J.). Similarly, Justice Powell there recognized:

> The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may — and indeed must — address directly the problems of discrimination in our society.
>
> * * * *
>
> ... It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory

> practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects.

448 U.S. at 449 and 502. The race-conscious program at issue in *Croson* on the other hand, was created under the City of Richmond's local powers. As the power bases for two programs are fundamentally different, any decision in *Croson* can have no bearing on this case which is governed by the principles settled in *Fullilove*.

Further, the United States' recommendation to hold must be viewed in light of its prior actions in this very case. The United States required the minority goal in issue. *H.K. Porter v. Metropolitan Dade County,* 650 F.2d 778, 780 n.1 (5th Cir. 1981). In 1980, it reviewed Respondents' actions in applying this federally-mandated goal requirement to Petitioner's bid and found that Respondents had complied with its regulations thereon. *Id.* at 780-1. The United States participated in Petitioner's first appeal as amicus, there suggesting to the court of appeals that Respondents' application of the federal goal requirement was constitutional (Br. of U.S. 12, n.10).

Despite such prior actions, the United States urges (*Id.*) this case be held because it now concludes that its own and Respondents' actions in this matter may be unconstitutional in light of *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Wygant did not deal with a federally-mandated program based on Congressional findings of discrimination, nor did it overrule or modify *Fullilove* which established the legal principles governing review of such federal actions. The decision in *Wygant* therefore does not afford any legal basis for holding this case.

Finally, even assuming for the sake of argument that the minority goal program here in issue was flawed — it is now defunct (Br. in Opp. 10-11). To Respondents' knowl-

edge there are no other pending cases involving this program, nor have any been cited by Respondents or the United States. The Department of Transportation's current affirmative action program differs substantively and procedurely from its former program which is at issue in this case (*Id.*). Therefore, this case has no precedential relevance in the current affirmative action context. Holding it would merely prolong litigation, the outcome of which can only affect the rights of the immediate parties.

CONCLUSION

This case is not independently worthy of certiorari review. It should not be held merely because an admittedly distinguishable case happens to be pending before the Court.

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CERTIFICATE OF SERVICE

I, Robert Anthony Cuevas, Jr., a member of the bar of this Court, hereby certify that on the 22 day of April, 1988, three copies of this Supplemental Brief were served by U.S. mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to CHARLES FRIED, United States Solicitor General, 10th and Pennsylvania N.W., Room 5143, Washington, D.C. 20530 and to CHARLES C. KLINE, ESQ., at Mershon, Sawyer, Johnston, Dunwody & Cole, Suite 4500, Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131, attorney for Petitioner.

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